

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900

No. 21. 28

THE CITY OF WALLA WALLA ED AL. APPELLANTS

THE WALLA WALLA WATER COMPANY

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF WASHINGTON

FILED OCTOBER 12, 1900

(10416)

(16,416.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 637.

THE CITY OF WALLA WALLA ET AL., APPELLANTS,

vs.

THE WALLA WALLA WATER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF WASHINGTON.

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- 1 In the Circuit Court of the United States for the District of Washington, in Chancery Sitting.

THE WALLA WALLA WATER COMPANY, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Washington, Plaintiff,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City, and Robert G. Parks, the Treasurer of said City; and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of and Constituting the Council of said City, Defendants.

- 2 To the judges of the circuit court of the United States for the district of Washington :

The Walla Walla Water Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, brings this bill of complaint against The City of Walla Walla, a municipal corporation organized and existing under the laws of Washington; John L. Roberts, mayor of said city; Henry Kelling, clerk of said city; Robert G. Parks, the treasurer of said city, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, members of and constituting the council of said city.

And thereupon your orator complains and says that plaintiff is and at all times mentioned in this bill of complaint was a corporation duly organized and existing under the laws of the Territory of Washington up to the time of the admission of the State of Washington into the Union, and since said time under the laws of the State of Washington, with full power and authority under its articles and the laws of said Territory and said State to build, erect, and maintain water works for the supplying of the city of Walla Walla and the inhabitants thereof with water.

That the city of Walla Walla is a municipal corporation duly incorporated as such by the legislature of the Territory of Washington by an act approved November 28th, A. D. 1883, entitled "An act to incorporate the city of Walla Walla and to particularly define the powers thereof," and that upon the admission of the State of Washington into the Union the said act of incorporation was continued in force under and by virtue of the constitution and laws of the State of Washington, and that the said act of incorporation is still of force and constitutes the charter of the said city of Walla

- 3 Walla and fully defines its powers and authority, except in so far as it may have been since changed by the general laws of the State of Washington regulating, limiting, and controlling municipal corporations.

That John L. Roberts is the mayor of said city, and under its charter is the chief executive officer of the said city; that Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L.

Jones, E. H. Massam, and Norman F. Butler are members of the council of said city and constitute the council of said city, and under its charter are, together with the mayor, the legislative power of said city, and are authorized to and charged with the power and duty of superintending its affairs and of carrying into effect its chartered powers; that Henry Kelling is the clerk of said city, and under its charter is required to keep all papers and books of the council, to attest all warrants drawn on the treasurer, to attest any other document when ordered to do so by the council, and to audit all demands against the city; that Robert G. Parks is the treasurer of said city, and is required by its charter to keep all moneys of the city and to pay the same out on the warrant of the mayor and clerk.

That by sections eleven and twelve of article two of the said act of incorporation of the city of Walla Walla it is provided:

"The city of Walla Walla shall have power to erect and maintain water works within or without the city limits or to authorize the erection of the same for the purpose of furnishing the city or the inhabitants thereof, with a sufficient supply of water and for the purpose of maintaining and protecting the same from injury, and the water from pollution, its jurisdiction shall extend over the territory occupied by such works and all reservoirs, streams, springs, trenches, pipes and drains used in and necessary for the construction, maintenance and operation of the same, and over the stream

or source from which the water is taken for five miles above
4 the point from which it is taken, and to enact all ordinances and regulations necessary to carry the power herein conferred into effect, but no water works shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city, or pay a property tax therein, on not less than five hundred dollars' worth of property, shall at a general or special election vote for the same. Such proposition shall be formulated and submitted not less than thirty days before election.

Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof, said city shall have power to regulate and sell the water thus brought therein, and the moneys arising therefrom shall constitute a fund to be used to defray the expenses of operating the same and to pay the purchase price thereof, and said city may levy and collect a special tax each year until the necessity therefor ceases to exist, not to exceed two-tenths of one per centum. Provided, however, no such tax shall be levied or collected until the question has been submitted, as provided in section eleven (11) of this act, to electors as therein named, and a majority thereof at an election shall favor the same."

That on and prior to the 15th day of March, 1887, the plaintiff herein was the owner of a water-works plant consisting of a water

supply in the neighborhood of the city of Walla Walla and of water mains, pipes, connections, and fittings in place in the highways, streets, and alleys of the city of Walla Walla and connected with the said water supply, and was engaged in supplying the citizens and residents of the city of Walla Walla with water for compensation paid by said citizens and residents, but the said plant was considered by the authorities of said city to be defective and insufficient to supply the city and its inhabitants with an ample supply of water, and it was deemed prudent and desirable by said authorities to contract with the plaintiff for an adequate supply of water for said city and inhabitants by means of additions and extensions of their plant to be made by plaintiff at the expense of a large outlay of money.

That the said city at said time was indebted in a sum exceeding \$16,000, and that in and by section 105 of article 12 of its charter it was forbidden to create an indebtedness of more than \$50,000; that its revenues, including the revenues which it was authorized by law to raise by taxation, did not and would not exceed its ordinary expenditures by more than \$10,000 per annum; that the cost of erecting any kind of water works for the said city and of introducing the same into the city was more than \$50,000, and that water works to adequately supply the said city, together with the necessary adjuncts and appurtenances, could not have been erected for less than the sum of \$150,000; that the plant then owned and operated by the plaintiff for said purpose had cost and was worth more than \$50,000, and that the estimated cost of the additions, extensions, and improvements to be made to its water works by the plaintiff, in order to comply with the contract hereinafter set out, was more than \$100,000, all of which was well known to the authorities of said city at the time of the making of said contract.

That for the reasons aforesaid and by virtue of the authority vested in it by its charter aforesaid the council of said city, on the 15th day of March, 1887, duly passed an ordinance entitled "An ordinance to secure a supply of water for the city of Walla Walla," in words and figures following, to wit:

"The city of Walla Walla does ordain as follows:

6 SECTION 1. The city of Walla Walla by this ordinance hereby contracts and agrees with the Walla Walla Water Company, a corporation duly organized and doing business under the laws of the Territory of Washington, in the manner and upon the terms and conditions as provided and set forth in this ordinance; and upon acceptance of the terms of this contract by said Walla Walla Water Company as hereinafter provided, the same shall thereupon become and be a valid and binding contract between the parties.

SEC. 2. The city of Walla Walla hereby gives and grants to said Walla Walla Water Company for the period of twenty-five (25) years from and after the date of the passage of this ordinance, the right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city for the purpose of furnishing the inhabitants thereof with water; but the

same shall be placed far enough under ground to constitute as little obstruction as practicable, and in such manner as to do the least practicable damage to streets; and not more than twenty-five feet from the boundary line of the street, and in all cases where ditches for such purposes shall be dug in the streets the same shall be left as near as practicable in the same condition as before, and the ground removed in digging such ditches shall be well and firmly packed and tamped while being replaced.

SEC. 3. The said water company shall hereafter lay all their mains of sufficient size to carry fire-hydrants, and they shall erect one stand pipe on each side of Mill creek at or below Sixth street, so as to equalize and make available the pressure of the water in their reservoirs as now constructed, and shall extend their system of mains as fast as the population and growth of the town shall reasonably warrant; and mains on the north and south side of Mill creek shall be connected so as to give pressure from the reservoir of the greatest elevation in time of fires; and the main on First street shall be connected with the Sixth Street main by mains through each
7 alternate cross-street from Birch to Main, inclusive.

SEC. 4. The city of Walla Walla shall have the right to erect in a proper and workmanlike manner, and maintain at its own expense, in such manner as to prevent leakage, as many fire-hydrants on the mains of the water company as it shall see fit, but not exceeding one at each street intersection; and in case of fire the city through its officers and employees, shall have all reasonable and necessary control of the water company's water, mains and reservoir, for the extinguishment thereof; and for the purpose of drilling fire companies shall use such water as may be necessary therefor, not oftener than once in two weeks for each fire company; and the city shall also use such water as may be necessary and convenient in its engine-houses and other city buildings, and to supply any and all city fire-cisterns.

SEC. 5. The city of Walla Walla shall pay to said Walla Walla Water Company for the matters and things above enumerated, quarter-yearly, on the first days of July, October, January and April of each year, at the rate of fifteen hundred dollars (\$1,500) per annum, for the period of twenty-five (25) years from and after the date of the passage of this ordinance, the first quarterly payment to be made on the first day of October next (October 1st, 1887).

SEC. 6. The city of Walla Walla shall during said period, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, not oftener than once each week.

SEC. 7. For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an
8 ample supply of good wholesome water, at reasonable rates, to consumers at all times during the said period of twenty-

five (25) years; and this contract shall be voidable by the city of Walla Walla so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part, herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the city of Walla Walla shall not erect, maintain or become interested in any water works except the ones herein referred to, save as hereinafter specified.

SEC. 8. Neither the existence of said contract nor the passage of this ordinance shall be construed to be or be a waiver of, or relinquishment of any right of the city to take, condemn, and pay for the water rights and works of said or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company.

SEC. 9. Since the city may, before the expiration of this contract, need or desire to use a greater pressure for the extinguishment of fires than to be furnished by gravitation from the company's reservoir, said water company in laying new mains hereafter shall lay down such mains within the limits where fire-hydrants shall be placed, as will sustain a reasonable pressure, not less than 50 pounds to the square inch at any point for such purpose; and in case the city shall, before the expiration of this contract, desire to use the company's mains for the extinguishment of fires otherwise than as provided in the preceding section of this ordinance, it shall have the right to do so upon payment of a reasonable quarterly compensation therefor.

9 SEC. 10. All contracts now existing between the city and said company requiring the payment of money by the city to said company, are hereby avoided and terminated.

SEC. 11. The clerk is hereby authorized and directed to make and enter into a contract in writing for and on behalf of the city of Walla Walla with the said Walla Walla Water Company in accordance with and in conformity to this ordinance, and the execution of such contract by the said Walla Walla Water Company shall be and constitute an acceptance of the terms of this ordinance and contract; and such contract as executed by both parties shall be recorded by the clerk in full in the book in which ordinances are recorded.

Passed the council March 15, 1887.

HENRY KELLING, *City Clerk.*

Approved March 19th, 1887.

J. M. BOYD, *Mayor.*"

Which said ordinance was duly approved by the mayor of said city on the 19th day of March, 1887, and was thereafter published, as required by the charter of said city, and within five days there-

after, to wit, on the 25th day of March, 1887, the same became and ever since has been in full force and effect as a valid ordinance of said city.

That pursuant to the terms of said ordinance, on, to wit, May 9th, 1887, this plaintiff and the city of Walla Walla duly and regularly made and entered into a contract in writing in the words and figures following, to wit:

"Know all men by these presents, that the city of Walla Walla has contracted and agreed, and by these presents does hereby contract and agree, with the Walla Walla Water Company, a corporation duly organized and doing business under the laws of Washington Territory, in the manner and form following, that is to say:

Whereas, the city council of the city of Walla Walla on the 10 15th day of March, 1887, duly passed and enacted, and on the 19th day of March, 1887, the mayor duly approved an ordinance, viz: ordinance number 270 entitled "An ordinance to secure a supply of water for the city of Walla Walla" recorded on page 400 of the Book of City Ordinances, and

Whereas, said Walla Walla Water Company, at a meeting of the board of trustees held at the office of the company on the 31st day of March, 1887, duly passed and adopted a resolution and entered the same of record in full upon the records of the corporation of which here follows a copy, to wit: Resolved, That the terms of that certain contract and agreement with the city of Walla Walla whereby this corporation agrees to furnish said city with water for certain purposes for the term of twenty-five (25) years, at the agreed price of fifteen hundred dollars (\$1,500) per year, said contract being fully set forth in an ordinance number 270, which duly passed the city council of said city on the 15th day of March, A. D., 1887, and was duly approved by the mayor on the 19th day of March, 1887, be and they are hereby approved, agreed to and accepted in all particulars, and the contracts and agreements in said ordinance contained, and subject to the conditions and limitations therein, are hereby ratified, approved and accepted on the part of this corporation, and the president and secretary of this corporation are hereby authorized and directed to make, execute and deliver, for and on behalf of this corporation, any other or further agreement, or instrument, proper and necessary to carry said ordinance into effect, as a proper, valid and binding contract between the said city and this corporation. Now therefore, this indenture, witnesseth, that the said city of Walla Walla and the said Walla Walla Water Company, have contracted and agreed, and they, the said parties, do hereby mutually contract and agree, by virtue of the premises, in manner and form as follows:

11 The city of Walla Walla hereby gives and grants the said Walla Walla Water Company, for the period of twenty-five (25) years, from and after the date of the passage of ordinance number 270, the right to lay, place and maintain all necessary water mains pipes, connections and fittings in all the highways, streets and alleys of said city for the purpose of furnishing the inhabitants

thereof with water; but the same are to be placed far enough under ground to constitute as little obstruction as practicable, and in such a manner as to do the least practicable damage to streets, and not more than twenty-five (25) feet from the boundary line of the street, and in all cases where ditches for such purposes shall be dug in the streets, the same shall be left as near as practicable in the same condition as before, and the ground removed in digging such ditches shall be well and firmly packed and tamped while being replaced. The said water company will hereafter lay all their mains of sufficient size to carry fire-hydrants, and they will erect one stand pipe on each side of Mill creek at or below Sixth street so as to equalize and make available the pressure of the water in their reservoir, as now constructed; and will extend their system of mains as fast as the population and growth of the town shall reasonably warrant. Mains on the north and south side of Mill street will be connected so as to give pressure from the reservoir of the greatest elevation in time of fire; the main on First street will be

3 connected with the Sixth Street main by mains through each alternate street from Birch to Main inclusive. [The city of

Walla Walla shall have the right to erect in a proper and workman like manner and maintain at its own expense, in such manner as to prevent leakage as many fire-hydrants on the mains of the water company as it shall see fit, not exceeding one (1) at each street intersection, and in case of fire the city, through its officers and employees, shall have all reasonable and necessary control of the water company's water, mains and reservoir for the extinguish-

12 ment thereof; and for the purpose of drilling, fire companies may use such water as may be necessary therefor, not oftener than once in two (2) weeks for each fire company, and the city may also use such water as may be necessary and convenient in and about its engine-houses and other city buildings, and to supply any and all city fire-cisterns. The city of Walla Walla agrees to pay to said Walla Walla Water Company for the matters and things above enumerated, quarter-yearly, on the first days of July, October, January and April of each year, at the rate of fifteen hundred dollars (\$1,500) per annum for the period of twenty-five (25) years from and after the date and passage of ordinance number 270, the first quarterly payment to be made on the 1st day of October next (October 1st, 1887).

The city of Walla Walla will during said period, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, and not oftener than once each week. For all the purposes above enumerated said Walla Walla Water Company will furnish an ample supply of water for domestic purposes, including sprinkling lawns, and an ample supply of good wholesome water at reasonable rates to consumers, at all times during the said period of twenty-five years; and this contract is voidable by the city of Walla Walla so far as it requires the payment of money upon the judgment of a

court of competent jurisdiction whenever there shall be a substantial failure of such supply or a substantial failure of the part of the water company to keep or perform any agreement or contract on its part herein specified or in this contract herein contained; but accident or reasonable delay shall not be deemed such failure, and until this contract has been so avoided, the city of Walla Walla will not erect, maintain or become interested in any water works except the one herein referred to, save as hereinafter specified. Neither the existence of this contract nor the passage of ordinance number 270 shall be construed to be or be a waiver of or relinquishment of any rights of the city to take, condemn and pay for the water rights and works of said company, or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company.

Since the city may before the expiration of this contract need or desire to use a greater pressure for the extinguishment of fires than can be furnished by gravitation from the company's reservoir, said water company in laying new mains hereafter will lay down such mains within the limits where fire-hydrants will be placed as will sustain a reasonable pressure, not less than fifty (50) pounds to the square inch, at any point for such purpose, and in case the city shall before the expiration of this contract desire to use the company's mains for the extinguishment of fires otherwise than as provided in the preceeding section of this contract, it shall have the right to do so upon payment of a reasonable quarterly compensation therefor. All contracts now existing between the city and said water company requiring the payment of money by said city to said water company are hereby avoided and terminated.

Witness the City of Walla Walla, by Henry Kelling, clerk, and the Walla Walla Water Company, by R. R. Rees, president, and Alvah Brown, secretary. Done in duplicate this 9th day of May, A. D. 1887.

[CITY SEAL.]

THE CITY OF WALLA WALLA,
By HENRY KELLING, *Clerk*.
THE WALLA WALLA WATER
COMPANY,

[CORPORATE SEAL.] By R. R. REES, *President*.

Attest: ALVAH BROWN, *Secretary*.

14 That the said contract was duly made, entered into and signed by the clerk of the said city for and on behalf of the said city, as in and by said ordinance directed, was recorded by the said clerk in full in the book of said city in which ordinances are recorded, and ever since said 9th day of May, 1887, the said contract has been a valid and binding contract between this plaintiff and the said city of Walla Walla.

That this plaintiff, pursuant to said contract and in order to comply with its terms, proceeded as rapidly as possible to lay, place, and maintain all necessary water mains, pipes, connections, and fittings

in the highways, streets, and alleys of the city of Walla Walla for the purpose of furnishing the city and its inhabitants with water, and has from time to time extended its system of mains as fast as the population and growth of said city would reasonably warrant, and all of which mains are of the size and capacity in the said contract provided and capable of sustaining the pressure and doing the work in and by said contract provided, and such mains as were being used at the time of the making of said contract and were not of the size or capacity therein required or were not capable of sustaining the pressure or of doing the work in and by said contract provided were at once replaced by others which were in every respect in accordance with said contract, and all mains of the company since the date of said contract have been maintained in good order and with full capacity to perform the office and do the work in and by said contract provided; that since the making of said contract the plaintiff has laid more than twenty miles of such mains

15 in the highways, streets, and alleys of the city of Walla Walla and now keeps and maintains the same in full and efficient operation as a part of its water-works system; that the plaintiff also erected the stand pipes in and by said contract provided and made the connections by said contract provided, has improved its water supply and improved and enlarged its reservoir, and the said plaintiff has expended in and about said additions and improvements more than the sum of one hundred thousand dollars.

That the plaintiff since making and entering into said contract has at all times furnished an ample supply of water to the city of Walla Walla for fire purposes and for all other purposes in and by said contract provided and has at all times furnished to consumers of water in the city of Walla Walla an ample supply of good, wholesome water, at reasonable rates, for all domestic purposes, including the sprinkling of lawns, and has in every respect complied with said contract between it and the said city of Walla Walla according to its true intent and meaning, and it proposed to and intends to comply with said contract in every respect so long as the same remains in force; that the population of the city of Walla Walla at the time of the making of said contract was about 4,000 inhabitants; that the present population is about 7,500 inhabitants; that the revenues which can be derived from supplying water to consumers in said city will not be sufficient to support more than one system of water works and are not sufficient to bring adequate returns even for one system of water works; that this fact was well known to plaintiff and to the mayor and council of said city at the time of the making of said contract; that the stipulation in said contract whereby the said city agreed not to erect, maintain,

16 or become interested in any water works except the water works of the plaintiff formed a material part of the consideration of said contract; that the plaintiff would not have made the large expenditures before stated for extending, improving, enlarging its system but for the said stipulation; that for the said city to now engage as a competitor with plaintiff in supplying the city and its inhabitants with water, with the city treasury as a

reserve to draw on for the purpose of supplying deficiencies of revenue, will amount to the practical annihilation of the value of plaintiff's plant and will cause it a loss of more than one hundred and fifty thousand dollars.

Your orator further shows that, notwithstanding the making of the said contract as hereinbefore alleged and the faithful observance of the same by this plaintiff, the council of said city, on the 20th day of June, 1893, passed, and on the same day the mayor of said city approved, an ordinance in the words and figures following to wit:

- 17 An ordinance to provide for the construction of a system of water works, to specify and adopt the gravity system of water works, to authorize the purchase, condemnation, and appropriation of lands in the city of Walla Walla and the county of Walla Walla necessary and expedient for the construction and maintenance of said water works and for a right of way; to declare the estimated cost of said water works, lands, and right of way; to provide for borrowing money to be used in payment therefor by issuing the negotiable coupon bonds of said city for the sum of \$160,000, and to provide for the calling of a special election for submitting such questions to the qualified voters of the city of Walla Walla for their ratification or rejection.

The city of Walla Walla does ordain as follows:

Whereas, the city council of said city of Walla Walla deem it advisable that the said city shall exercise the authority conferred upon them in relation to water works, under and by virtue of an act of the legislature of the State of Washington, entitled "An act relating to and authorizing cities and towns to purchase, construct, and maintain water works, systems of sewerage, gas and electric light plants, and to issue bonds to pay therefor, and declaring an emergency," approved February 10th, 1893:

Now therefore: the city of Walla Walla does ordain as follows:

SECTION 1. That the gravity system of water works be and the same is hereby specified and adopted, and the same shall be constructed so that it shall be sufficient to adequately supply the city of Walla Walla and the inhabitants thereof with pure, fresh water, sufficient for all their necessary uses.

- 18 SEC. 2. The estimated cost of said water works, and improvements as herein proposed, is \$160,000, divided as follows:

1,472.22 tons of cast-iron pipe at \$45.10.....	\$66,397 00
Laying 87,530 linear feet 4 to 14 inch pipe.....	15,502 00
Hydrant connections.....	1,290 00
Pipe delivery	736 00
Special castings.....	1,837 00
70 hydrants.....	2,700 00
114 valves.....	3,000 00
Gravity main	42,929 00

Water supply	\$10,000 00
Lands and right of way	8,000 00
Contingency and engineering	7,609 00
Total estimated cost	\$160,000 00

It being proposed to take the necessary supply of water from a point on the following-described premises in Walla Walla county, State of Washington, to wit: Beginning at a point described in deed from Joseph W. Harbert to Green Riffle, as being a point 30.95 chains north of a point where the south line of the United States military timber reservation intersects the section line between sections 23 and 24, t'p 7, N., R. 36, E. W. M., thence south 1,175.10 feet; thence north 64 deg. 15 min. east 1.28 feet; thence north 89 deg. 3 min. east 150 feet; thence north 66 deg. 45 min. east 500 feet; thence north 54 deg. 48 min. east 200 feet; thence north 50 deg. 35 min. east 283 feet; thence north 69 deg. 52 min. east 200 feet; thence north 87 deg. 43 min. east 93 feet; thence south 86 deg. 44 min. east 300 feet; thence south 84 deg. 14 min. east 100 feet; thence north 56 deg. 30 min. east 1,300 feet; thence south 85 deg. 26 min. west 383 feet; thence north 66 deg. 33 min. west 399 feet; thence south 24 deg. 53 min. west 531.8 feet; thence south 60 deg. 27 min. west 183.8 feet; thence north 18 deg. 22 min. west 320 feet; thence north 15 deg. 3 min. west 75.2 feet; thence south 79 deg. west 1,350 feet to the point of beginning, containing in all 56.2 acres, and to conduct the same by means of mains and supply pipes by the shortest and most direct route practicable to the corporate limits of said city, and to distribute the same by means of mains and pipes throughout said city.

Sec. 3. That the mayor and the water committee of said council shall have the power to purchase lands necessary and expedient for obtaining said supply of water, for maintaining a water-works plant, and for right of way, and in the event that the said city council shall be unable to agree with the owner or owners of any of said land necessary or expedient for the purposes above specified, the said land shall be appropriated and condemned under and by virtue and in accordance with an act of the legislature of the State of Washington entitled "An act to regulate the mode of proceeding to appropriate lands, real estate or property, by a corporation for corporate purposes, and of ascertaining and securing compensation therefor, and repealing laws in conflict with this act, and declaring an emergency," approved March 21st, 1890, as amended by an act of said legislature entitled "An act in relation to the appropriation of property by corporations" approved February 25th, 1891, and as further amended by an act of said legislature entitled "An act giving the power and regulating the mode of procedure to acquire, take or damage private property by municipal corporations, except cities of the first class, and of ascertaining and securing compensation therefor, and repealing laws in conflict with this act," approved March 8th, 1893.

SEC. 4. For the purpose of borrowing money for the construction

of said water works and the payment for said lands and right of way, the city of Walla Walla shall issue its negotiable coupon bonds for the sum of \$160,000, in denominations of \$1,000 each, numbered from one up consecutively, bearing the date of their issue, payable not more than twenty years from their date, to bearer, at some bank in the city of New York, State of New York, to be hereafter designated by said council, bearing interest at 5 per cent. per annum, interest payable semi-annually, with interest coupons attached, to be payable in gold coin of the United States of America, of the present standard, weight and fineness, and to be known as the "water bonds of the city of Walla Walla," and said bonds shall, after being duly advertised for sale for at least 30 days, *shall* be sold by the said city council upon the most advantageous terms, and the proceeds of said bonds shall be paid into the city treasury to the credit of a fund to be known as the "city water fund."

SEC. 5. If the incurring of said indebtedness and the issue of said bonds shall be authorized by vote of the people as hereinafter provided for, there shall be levied each year a tax upon the taxable property of said city of Walla Walla sufficient to pay the interest upon said bonds as the same accrued, and before 7 years prior to the maturity of said bonds an annual sinking-fund tax sufficient for the payment of said bonds at maturity, which taxes shall become due and collectible by said city as other taxes, and in accordance with the revenue laws of the State of Washington.

SEC. 6. That a special election shall be held in and for said city of Walla Walla on the 27th day of July, 1893, for the purpose of submitting to the qualified voters of said city the question of the adoption or rejection of the said proposed system of water works, and the question whether the said city shall become indebted and issue bonds for the construction of said water works as above specified.

SECTION 7. All persons who shall be in favor of the adoption of said gravity system and the construction of said water works and the incurring of said indebtedness as herein proposed, shall at said election vote a ballot containing the following words, to wit: "In favor of the adoption of the gravity system of water works, and the construction of water works by the city of Walla Walla, and the incurring of an indebtedness for said water works, and the issuing of negotiable coupon bonds of said city therefor, in accordance with ordinance number 480 of said city of Walla Walla." Every person who shall vote against said propositions shall vote a ballot containing the following words, to wit: "Against the adoption of the gravity system of water works, and the construction of water works by the city of Walla Walla, and the incurring of an indebtedness for said water works, and the issuing of negotiable coupon bonds of said city therefor, in accordance with ordinance number 480 of said city of Walla Walla."

SEC. 8. Said election shall be held at such voting places in the several precincts of said city, and shall be conducted by such judges and inspectors of election as may be hereafter designated and appointed, and shall be conducted in all respects as pro-

vided by the charter of said city and the general laws of the State of Washington. The city clerk shall give at least 30 days' notice of the time, place and purpose of said election, and of the proposition to be submitted thereat, together with the form of ballot to be used, which notice shall be published in the city official paper for 30 days next preceding said election, and shall be posted for a like period at all the places designated therein for holding said election.

SEC. 9. This ordinance shall immediately after its passage and approval by the mayor be published in the official newspaper of said city for five days consecutively in each issue of said paper during said time, and shall take effect upon the expiration of said publication.

Passed the council June 20, 1893.

HENRY KELLING,
City Clerk.

Approved June 20, 1893.

JOHN L. ROBERTS, *Mayor.*

23 That an election was held in the said city on the 27th day of July, 1893, as in and by said ordinance provided, for the purposes therein stated, and it is now claimed and pretended by the said city and its said officers, including those made defendants herein, that the proposition submitted in and by said ordinance was carried by a majority sufficient to authorize the said city to erect and maintain a system of water works of its own for the purpose of supplying itself and supplying consumers for compensation with water and of contracting an indebtedness in the sum in said ordinance specified for said purpose, and the said city and its said officers, the defendants herein, claim and insist that its contract with this plaintiff is not a valid and binding contract, neither in respect to the stipulation binding the city not to erect, maintain, or be interested in any system of water works other than those of plaintiff nor in respect to the stipulation for the furnishing of water to the city by this plaintiff and the compensation to be paid therefor, and said city and said officers refuse to be bound by said contract or to observe the same, and said city and said officers, regardless of the rights of your orator under said contract, are proceeding to borrow money to erect and maintain water works as in and by the ordinance last above set out provided, and have advertised the municipal bonds of the said city to the amount of \$160,000 for sale on the 30th day of January, 1894, for the purpose of erecting and maintaining said water works, and threaten to and will on said day, unless restrained by this honorable court, sell said bonds and apply the proceeds to the erection of water works for the supplying of the inhabitants and consumers of the city with water for reward

24 and compensation, and will become a competitor with plaintiff for the trade or custom of said inhabitants or consumers, and said city of Walla Walla is now and for some time last past has been expending large sums of money for a water supply and for the improvement of the same and for preliminary work in connec-

tion with its proposed system of water works, and is continuing to make said expenditures and will continue to do so, and threatens to and will commence the erection of said system of water works at a large expense if it shall sell its bonds for said purpose, and threatens to and will prosecute said work to a completion and will become a competitor with plaintiff for the trade and custom of the consumers of water in the city of Walla Walla as soon as said work shall have been completed.

And your orator further shows that plaintiff is the owner of property in the city of Walla Walla of the value of \$125,000, and that it pays taxes to said city on the same; that there are more than two thousand other tax-payers in the city of Walla Walla, and that the taxable value of the property therein is more than three million dollars; that the contract of the said city with plaintiff is an insuperable obstacle to its erecting and maintaining water works for the supply of its inhabitants with water; that if the said city is permitted to borrow said money and apply the same to the erection of such water works the same will be wholly lost to said city and its inhabitants; that the said indebtedness will be paid and can only be paid by the levy and collection of taxes from the tax-payers of the city; that the said indebtedness will become a cloud and a burden on all the taxable property in the city, and that for the said city to borrow said money and to apply it as threatened and proposed is inequitable and imposes upon the tax-payers of said
25 city a large and unnecessary burden and constitutes a diversion of the revenues of said city from its treasury to an unlawful and unnecessary purpose.

Your orator further shows that the value of its property is largely dependent on the fact of its having no competition in the city of Walla Walla, and particularly no competition from the city of Walla Walla, and on the fact of its contract right to be free from competition by the city of Walla Walla during the life of its contract; that it is necessary for the plaintiff in the prosecution of its business to borrow money from time to time and to extend its credit; that the illegal action of the said city and its said officers heretofore taken, as in this bill alleged, and the threatened action of the said city in borrowing money and proceeding to erect rival and competing water works have greatly diminished the value of the plaintiff's said property and have diminished its credit, so that it finds itself without the ability to borrow money with which to make necessary additions and repairs to its said property and to maintain the same in condition to furnish an adequate supply of water to its customers, and that the value of its properties and the sources of its credit are being still further diminished the longer said illegal pretensions are indulged in, and that plaintiff will be irreparably damaged unless this honorable court interpose and by its injunction restrain said defendants from further prosecuting their said lawless and illegal purpose.

Your orator further shows that by its system of water works it furnishes to the city of Walla Walla an adequate supply of water

26 and of sufficient pressure for all the needful and proper purposes of said city and at all points in said city of Walla Walla where the same is or may be needed, and that it furnishes to all the inhabitants of said city, at a reasonable rate and at as low a rate as any maintained on the Pacific coast, whether by private companies or by municipalities, an ample supply of pure, wholesome water, and that its water mains are extensive and well distributed throughout the city, so as to reasonably supply the entire city; and your orator alleges that there is no necessity for an additional supply of water to be furnished by the city, and that the action of the said city of Walla Walla and of its officers in attempting to violate its contract with your orator and in attempting to build competing water works in contempt of said contract and at large expense is an oppressive and unjust exercise of power and one which should be restrained by a court of equity.

Your orator further shows that its rights under said contract with the city of Walla Walla, to wit, its right to receive compensation from said city for water furnished to it at the rate in said contract provided and its right under said contract to have the city of Walla Walla refrain from erecting, maintaining, or becoming interested in water works other than the water works of plaintiff in the city of Walla Walla, are of great value, to wit, of the value of more than \$50,000; that the damage which will be inflicted on it if the said city of Walla Walla be permitted to repudiate its said contract and to carry out its present purpose of erecting and maintaining water works of its own will be in excess of the sum of \$50,000; that the city of Walla Walla and its officers, including the defendants herein, threaten to and unless restrained by this honorable court will, on the 30th day of January, 1894, proceed to sell the negotiable bonds of the city of Walla Walla for the purpose of erecting the said water works and will immediately commence the erection of the same, and that there is not sufficient time before said date to give notice of an application for a temporary injunction, and that an exigency exists for the granting of such temporary injunction without notice.

27 And your orator says unto your honors that all and singular the acts and doings of the defendant said City of Walla Walla and defendants Its Mayor and Council and defendants the said City Clerk and City Treasurer are in fraud of the plaintiff's rights in the premises and deprive it of its rights under its said contract with said city and of the protection guaranteed to it under said contract by the Constitution of the United States. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and that each of them may come to a fair account of the matters and things in this bill alleged and may be required to answer the same, but not under oath, answer under oath being hereby waived, may it please the court to grant your orator a temporary restraining order and injunction, restraining and enjoining the defendants The City of Walla Walla, the defendant John L. Roberts, mayor of said city; the defendants Daniel Stewart, John G. Muntinga, B. D. Crocker,

Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, the council of said city; the defendant Henry Kelling, the clerk of said city, and the defendant Robert G. Parks, the treasurer of said city, and all of their servants, agents, and employees from proceeding further to erect water works in and for the city of Walla Walla as in and by the ordinance of said city set out in the bill of complaint it is proposed, or from acquiring any property for the purpose of carrying out the scheme of water works as in said ordinance proposed, or from further expending the moneys of the city in furthering or promoting said scheme of water works, or from negotiating or selling the bonds or other securities of the city of Walla Walla for the purpose of enabling the said city to erect said water works, and from further denying the obligations of the city of Walla Walla, under its contract with the Walla Walla Water Company, set out in the bill of complaint, to obtain its water

29 supply from the said company at the price fixed by said contract, and from denying its obligations under said contract to refrain from building, maintaining, or becoming interested in any system of water works other than that belonging to the plaintiff, and that a rule issue to the several defendants to show cause upon a short day, to be named therein, why the said injunction be not continued in force pending the determination of this action.

And that upon a final hearing of this bill said injunction may be made perpetual, and that the said contract between plaintiff and the defendant The City of Walla Walla be decreed to be a valid and binding contract in its every part, and that the attempt of the said defendant, The City of Walla Walla, to build, erect, and maintain a system of water works in and for the city of Walla Walla be decreed to be an invasion of said contract and illegal.

30 May it please your honors to grant unto your orator the most gracious writ of subpoena of the United States, to be directed to the City of Walla Walla, John L. Roberts, Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Henry Kelling and Robert G. Parks, commanding them and every of them, at a certain day and under certain pain therein to be inserted, personally to be and appear before your honors in this honorable court and then and there to answer to all and singular the premises and to stand to, perform, and abide such orders and decrees therein as to this honorable court shall seem meet and proper; and, as in duty bound, your orator shall ever pray.

(Signed) TURNER, GRAVES & McKINSTRY,
Solicitors for Complainant.

(Signed) GEORGE TURNER, *Of Counsel.*

31 STATE OF WASHINGTON, }
County of Walla Walla, } ss :

Harry H. Turner, being first duly sworn, upon his oath deposes and says that he is the secretary of the plaintiff, The Walla Walla Water Company; that he has read the foregoing bill; that he is

familiar with each and every of the allegations and of the matters and things therein contained and set up; that he knows all the matters and things therein alleged and set up to be true, and that the same are true.

(Signed)

HARRY H. TURNER.

Subscribed and sworn to before me this 26th day of January, 1894.

[SEAL.]

JOSEPHUS M. MOORE,
*Notary Public in and for the State of Washington,
Residing at Walla Walla.*

32 (Endorsed on back as follows:) No. 103. The Walla Walla Water Company, complainant, *vs.* The City of Walla Walla *et al.*, defendants. Filed January 26, 1894. A. Reeves Ayres, clerk, by W. T. Dovell, deputy. Turner, Graves & McKinstry, Review building, Spokane, Wash., att'ys for plaintiff.

33 In the Circuit Court of the United States for the District of Washington, in Chancery Sitting.

THE WALLA WALLA WATER COMPANY, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Washington, Plaintiff,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. ROBERTS, Mayor of said City; Henry Kelling, Clerk of said City, and Robert G. Parks, the Treasurer of said City, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of and Constituting the Council of said City, Defendants.

It appearing that the bill of complaint in the above-entitled action has been duly filed, and that notice of motion for an injunction, as prayed in the complaint, has been duly given, to be heard before the undersigned at the United States court-room, in Seattle, at 10 o'clock a. m. February 5th, 1894, and it appearing from the averments of the bill of complaint that a proper case is presented for the granting of a temporary restraining order, as prayed in said bill of complaint:

Now, therefore, it is ordered that the hearing of the motion for a temporary injunction be fixed for February 5th, 1894, at 10 o'clock a. m., at Seattle, according to the terms of said notice, and—

It is further ordered that until the determination upon the said motion for a temporary injunction that the defendants and each of them, their agents, servants, and employees, be restrained from proceeding further to erect water works in and for the city of Walla Walla, as in and by the ordinance of said city set out in the bill of complaint it is proposed, or from acquiring any property for the purpose of carrying out the scheme of water works, as in said ordinance proposed, or from further expending the moneys of the said

city in furthering or promoting said scheme of water works, or from negotiating or selling the bonds or other securities of the city of Walla Walla for the purpose of enabling said city to erect said water works.

Dated at Seattle this 27th day of January, 1894.

(Signed)

C. H. HANFORD, Judge.

34 (Endorsed on back as follows:) Original. No. —. In the circuit court of the United States for the district of Washington. The Walla Walla Water Company vs. The City of Walla Walla. Restraining order. Filed Jan. 27th, 1894. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

35 In the Circuit Court of the United States, District of Washington.

WALLA WALLA WATER COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City, and Robert G. Parks, the Treasurer of said City, and Daniel Stewart, John G. Muntinga, B. D. Crocker, John L. Jones, Jacob Betz, E. H. Massam, and Norman F. Butler, Members of and Constituting the Council of said City, Defendants.

The Demurrer of the Above-named Defendants to the Bill of Complaint of the Plaintiff Above Named.

These defendants, by protestation, not confessing or acknowledging any of the matters and things in the said bill of complaint to be true in the manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth:

I.

It appeareth by the plaintiff's own showing that — is not entitled to the relief prayed for in said bill against these defend-.

36

II.

It appeareth by the complainant's own showing in the said bill of complaint that the court has no jurisdiction of the subject-matter in said bill contained.

III.

It appeareth from the complainant's own showing in the said bill of complaint contained that the court has no jurisdiction of the parties named in said bill.

Wherefore, for divers other good causes of demurrer in said bill of complaint appearing, the said defendants do demur thereto, and they pray the judgment of this honorable court that they be not compelled

to answer the said bill, and that they be dismissed with their proper costs herein incurred.

STRATTON, LEWIS & GILMAN,
Solicitors for Defendants.

I, L. C. Gilman, do hereby certify that the above demurrer is, in my judgment, well founded in point of law.

(Signed) L. C. GILMAN,
One of the Solicitors and Attorneys for the Defendants Herein.

STATE OF WASHINGTON, }
County of King, District of Washington, } ss :

John L. Roberts, being first duly sworn, says that he is the mayor of the city of Walla Walla and one of the above-named defendants; that the foregoing-named demurrer is not interposed for delay.

(Signed) JOHN L. ROBERTS.

Subscribed and sworn to before me February 6th, 1894.

(Signed) A. REEVES AYRES,
Clerk U. S. Circuit Court.

37 (Endorsed on back as follows:) No. —. In the — court of the United States for the district of Washington, northern division. —, plaintiff, vs. —, defendant. Filed Feb'y 6th, 1894. (Signed) A. Reeves Ayres, clerk. Stratton, Lewis & Gilman, attorneys for —, 101-106 Occidental block, Seattle. Copy of within demurrer received and due service of the same acknowledged this 6 day of Feb'y, 1894. (Signed) Turner, Graves & McKinstry, attorney- for complainant.

38 In the Circuit Court of the United States for the District of Washington, in Chancery Sitting.

THE WALLA WALLA WATER COMPANY, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Washington, Complainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; John L. Roberts, Mayor of said City; Daniel Stuart, John Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman L. Butler, Members of the City Council of said City; Henry Kelling, the Clerk of said City, and Robert G. Parks, the Treasurer of said City, Defendants.

This cause coming on to be heard on the 6th day of February, 1894, at the city of Tacoma, the same being heard at the said time and place by consent of parties, upon the application of complainant for an injunction *pendente lite* and the demurrer of defendant to the bill of complaint, complainant appearing by George Turner, Esquire, and defendants appearing — L. C. Gilman, Esquire, and W. T. Dovell, Esquire, said matters were duly argued by said counsel and taken under advisement by the court.

And now it appearing to the court after due consideration that complainant is entitled to an injunction pending the determination of this cause upon the showing made by the said bill of complaint, and the said demurrer of defendant- is not well founded in law—

It is now therefore ordered that said demurrer be, and the same is hereby, overruled, and it is further ordered that until the further order of this court the defendants and each of them, their agents, servants, and employees, be restrained from proceeding further to erect water works in and for the city of Walla Walla, as in and by the ordinance of said city, set out in the bill of complaint, it is proposed, or from acquiring any property for the purpose of carrying out the scheme of water works as in said ordinance proposed, 39 or from further spending the moneys of the said city in furthering or promoting said scheme of water works, or from negotiating or selling the bonds or other security of the city of Walla Walla for the purpose of enabling said city to erect said water works.

To the granting of said injunction and the overruling of said demurrer said defendants and each of them duly except, which exception is allowed by the court.

It is ordered that said defendants have twenty days in which to answer said bill of complaint.

April 6th, 1894.

(Signed)

C. H. HANFORD, *Judge.*

(Endorsed on back as follows :) In the circuit court of the United States, district of Washington, southern division. The Walla Walla Water Company, complainant, *vs.* The City of Walla Walla *et al.*, defendants. Order. Filed April 7th, 1894. A. Reeves Ayres, clerk, by W. H. Kirkman, deputy.

40 In the Circuit Court of the United States for the District of Washington, Sitting in Chancery.

THE WALLA WALLA WATER COMPANY, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Washington, Complainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation ; JOHN L. Roberts, Mayor of said City ; Henry Keiling, Clerk of said City ; Robert G. Parks, Treasurer of said City ; Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of and Constituting the City Council of said City, Defendants.

To the judges of the circuit court of the United States for the district of Washington :

The defendants, for answer to the bill of complaint of the above-named complainants, say :

I.

We believe that at the times mentioned in said bill of complaint

the complainant was and that it now is a corporation organized and existing under the laws of the Territory (now State) of Washington, but we are ignorant as to the powers vested in said corporation under its articles and the laws of the Territory and State of Washington. We admit that the city of Walla Walla is a municipal corporation, duly incorporated as such by the legislature of the Territory of Washington by an act approved November 28th, A. D.

1883, entitled "An act to incorporate the city of Walla Walla
41 and to particularly define the powers thereof." We admit that upon the admission of the State of Washington as one of the States of the Union the said act of incorporation was continued in force by virtue of the constitution of said State, and that said act of incorporation is still of force and constitutes the charter of said city of Walla Walla and defines its powers and authority, except in so far as it has been since changed and modified by the general laws of the State of Washington. We admit that John L. Roberts is mayor of said city and its general executive officer. We admit that Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler are members and all the members of the council of said city, and together with the mayor constitute, under its charter, the legislative power of said city, and are authorized to and charged with the power of superintending its affairs and carrying into effect its charter powers. We admit that Henry Kelling is the clerk of said city, and is required under its charter to keep all papers and books of the council, and to attest all warrants drawn by the treasurer, and to attest any other documents when ordered to do so by the council, and to audit all demands against the city. We admit that Robert G. Parks is the treasurer of said city, and is required by its charter to keep all moneys of the city and to pay the same out on the warrant of the mayor and clerk.

II.

We admit that sections 11 and 12 of article II of the said act of incorporation of the city of Walla Walla is as set forth in complain-t's bill of complaint.

III.

42 We admit that on and prior to the 15th day of March, 1887, the complainant was the owner of a water-works plant and was engaged in supplying the citizens and residents of the city of Walla Walla with water for compensation, and that said plant was considered and was defective and insufficient to supply the city and its inhabitants with an ample supply of water. We deny that it was deemed prudent or desirable by said authorities to contract with the plaintiff for an adequate supply of water for said city and inhabitants by means of additions and extensions of said plant to be made by plaintiff at the expense of a large outlay of money, or that it was deemed prudent or desirable to contract with said complainant at all. We admit that the said city at said time was indebted in a sum exceeding sixteen thousand dollars, and we

admit that in and by section 105 of article 12 of its charter it was forbidden to create an indebtedness of more than fifty thousand dollars. We admit that its revenues, including the revenues it was authorized by law to raise by taxation, did not and would not exceed its ordinary expenditures by more than ten thousand dollars per annum. We admit that the cost of erecting water works sufficient to supply said city would have been fifty thousand dollars. We deny that water works to adequately supply said city at said time, with the necessary adjuncts and appurtenances, could not have been erected for less than the sum of one hundred and fifty thousand dollars. We deny that the same would at said time have cost any sum to exceed seventy-five thousand dollars. We deny that the plant then owned and operated by the plaintiff had cost or was worth more than fifty thousand dollars or any sum whatever to exceed twenty-five thousand dollars. We deny that the estimated cost of the additions, extensions, and improvements to be made to its water works by the complainant was more than one hundred thousand dollars or any sum to exceed twenty-five thousand dollars.

IV.

We admit that the city council of the city of Walla Walla on the 15th day of March, 1887, passed an ordinance entitled "An ordinance to secure a supply of water for the city of Walla Walla," and that said ordinance is in the words and figures set forth in complainant's bill of complaint. We deny that said ordinance was passed for the reasons set forth in said bill or by virtue of any authority vested in said city council by its charter, and allege that said ordinance was passed without any good or sufficient reason, and that said city had no power by its charter to adopt the aforesaid ordinance. We admit that said ordinance was on the 19th day of March, 1887, approved by the mayor of said city, and that the said — was thereafter published. We deny that said ordinance at said time became or that it ever was in full force and effect as a valid ordinance of said city, and deny that the same had at any time any force or validity whatsoever. We allege that said ordinance was beyond the powers of said council, and that the same was *ultra vires*, and that the same never had any binding force or validity whatsoever. We admit that a certain pretended contract was entered into pursuant to the terms of said ordinance by said complainant and the city of Walla Walla on the 9th day of May, 1887, and that said pretended contract was in the words and figures set forth in complainant's bill of complaint. We deny that the same was duly or regularly made or entered into, and we deny that said contract has at any time been or is now or ever was a valid or binding contract between said complainant and the said city of Walla Walla, and allege that the same is *ultra vires* and invalid. We allege that the terms of said contract was not before the same was entered into or at any time or at all submitted to a vote of the taxpayers of said city at a special election called by the city council

therefor, nor was the same submitted to a vote of the tax-payers at any time or at all.

V.

We deny that complainant complied with the terms of said contract or placed or maintained the necessary water mains or pipes or connections or fittings in the highways or streets or alleys of the city of Walla Walla. We deny that it has from time to time or at all extended a system of mains as fast as the population and growth of said city warranted. We deny that all or any of its mains are of the size or capacity in said alleged contract provided or capable of sustaining the pressure or doing the work in or by said alleged contract provided. We deny that the insufficient mains were replaced by mains which were in every or in any respect in accordance with said alleged contract. We deny that all or any of the mains of the company, since the date of said alleged contract or at all, have been maintained in good order or condition or of sufficient capacity to perform the office or do the work in or by said alleged contract provided. We deny that since the making of said contract complainant has laid more than twenty miles or any amount to exceed ten miles of such mains in the highways, streets, and alleys of the city of Walla Walla. We deny that said complainant now keeps or maintains the same in full or efficient operation, and we deny that complainant has erected the stand pipes as in said alleged contract provided or made the connections by said contract provided or has improved its water supply. We deny that said complainant has expended in or about said additions or improvements more than the sum of one hundred thousand dollars or any sum to exceed fifty thousand dollars. We deny that since making

45 and entering into said alleged contract the complainant has at all times or at any time furnished an ample supply of water to the city of Walla Walla for fire purposes or for any purpose whatsoever. We deny that it has at all times since the making of said alleged contract or at any time or at all furnished to the consumers of water in the city of Walla Walla an ample or sufficient supply of good or wholesome water at reasonable rates for domestic purposes or the sprinkling of lawns or for any purpose whatsoever. We deny that complainant has in every respect or in any respect complied with said alleged contract, or that it proposes or intends to so comply with the same. We admit that the population of the city of Walla Walla at the time of the making of said alleged contract was about four thousand inhabitants. We admit that the present population is upwards of seven thousand five hundred inhabitants.

We deny that the revenues which can be derived from supplying water to consumers in said city will not be sufficient to support more than one system of water works. We deny that the same are not sufficient to bring adequate returns for one system of water works. We deny that the stipulation in said alleged contract whereby the city agreed to not erect, maintain, or become interested in any water works except the water works of complainant formed

the material or any part of the consideration of said contract. We deny that the complainant would not have made large expenditures but for said stipulation.

We deny that for the said city to now engage as a competitor with the complainant in supplying the city or its inhabitants with water, with the city treasury as a reserve to draw on for the purpose of supplying deficiencies of revenue, will amount to a practical annihilation or any annihilation of the value of complainant's
46 plant, or that the same will cause it a loss of more than one hundred and fifty thousand dollars or a loss of any sum whatsoever. We allege that the proposed plant to be erected by said city will be more than self-sustaining, and that the operation of the same, instead of creating a deficiency, will produce a revenue for said city and will enable the citizens and inhabitants of the city of Walla Walla to obtain water at a much cheaper rate than it now obtains the same from said complainant, and we allege that the present supply of water being furnished to the city of Walla Walla and the inhabitants thereof by the said complainant is entirely insufficient for domestic, sanitary, or fire purposes; that the pressure is entirely insufficient, so that in many parts of said city water cannot be carried by the present pressure above the first stories of the buildings and the dwellings of the inhabitants, and that by reason thereof people dwelling in the second stories of such buildings are unable to obtain any supply of water whatever for domestic or sanitary purposes; that the pressure is so insufficient and the mains, pipes, and hydrants so inadequate that the said city of Walla Walla cannot obtain a sufficient supply of water for the extinguishment of fires, and valuable property in many parts of said city is wholly at the mercy of fire; that said city and the inhabitants thereof cannot obtain a sufficient or adequate supply of water for the sprinkling of lawns or for the sprinkling of streets or for the flushing of sewers, and it is now absolutely impossible for said city of Walla Walla, with the supply of water so furnished by said complainant, to preserve the public health or to protect property of its citizens from fire or to otherwise perform the duties imposed upon it by its charter in the protection of the health, lives, and property of its citizens, all of which is well known to the complainant; that the water furnished by said complainant is
47 not pure or wholesome, but, on the contrary, is impure and unwholesome.

VI.

We admit that the city of Walla Walla, on the 20th day of June, 1893, passed, and that on the same day the mayor of said city approved, the ordinance set forth in complainant's bill of complaint. We admit that pursuant to said ordinance an election was held in said city on the 27th day of July, 1893, of which due notice was given. We admit that the proposition submitted in and by said ordinance was carried by a majority sufficient to authorize the said city to erect and maintain a system of water works of its own for the purpose of supplying consumers with water and for contract-

ing an indebtedness in the sum specified in said ordinance for said purpose. We admit that the defendants herein claim and insist that defendants' alleged contract with complainant is not a valid and binding contract so far as concerns the stipulation binding the city not to erect or maintain or become interested in any system of water works other than those of complainant. We deny that said city or its officers *has* refused to be bound to said contract or to observe the same, except so far as concerns the stipulation that said city should not erect water works of its own. We admit that we have advertised the municipal bonds of said city to the amount of one hundred and sixty thousand dollars for sale on the 30th day of January, 1894, for the purpose of erecting and maintaining said water works, and we admit that said city intends to sell said bonds and apply the proceeds to the erection of water works for the supply of the inhabitants and consumers of said city with water for award and compensation. We admit that said city will become a competitor with the plaintiff for the trade and custom of said inhabitants and consumers. We admit that the city of Walla

48 Walla has expended the necessary sums of money for obtaining a water supply and for preliminary work in connection with its proposed system of water works. We admit that it intends, unless restrained by this honorable court, to continue to make such expenditures and to commence the erection of said system of water works if it shall sell its bonds for said purpose. We admit that it intends, unless restrained by said court, to prosecute said work to a completion, and for compensation to supply the consumers of water in the city of Walla Walla with water. We admit that complainant is the owner of property in the city of Walla Walla. We deny that the same is of the value of one hundred and twenty-five thousand dollars or any sum to exceed fifty thousand dollars, upon which said sum it pays taxes to said city. We admit that there are more than two thousand tax-payers in the city of Walla Walla, and that the taxable value of the property therein is more than three million dollars.

We deny that the alleged contract of said city with complainant is an insuperable obstacle or any obstacle whatever to its erecting or maintaining any water works for the supply of said city with water. We deny that if the defendant is permitted to borrow money and apply the same to the erection of water works the same will be wholly lost or lost at all to the said city or its inhabitants. We deny that said inhabitants will be paid and can only be paid by the levy and collection of taxes from the tax-payers of the city, and allege that the greater portion, if not the whole thereof, can be paid by the revenues of the water works so to be erected. We deny that said indebtedness will become a cloud or burden upon all or any of the taxable property in said city, and we deny that for the said city to borrow said money and to apply it as proposed is inequitable, 49 or that the same imposes upon the tax-payers of said city a large or unnecessary burden or any burden whatever. We deny that the same constitutes a diversion of the revenues of said city from its treasury to any unlawful or unnecessary purpose.

We deny that the value of property of complainant is wholly dependent on the fact of its having no competition in or from the city of Walla Walla. We deny that by its alleged contract it has the right to be free from competition by the city of Walla Walla during the life of said alleged contract. We deny that it is necessary for the complainant in the prosecution of its business to borrow money from time to time or at all to extend its credit. We deny that any illegal action of the said city or its officers heretofore taken or proposed to be taken in borrowing money and proceeding to erect water works *have* greatly diminished the value of complainant's property. We deny that any action of said city has diminished its credit. We are ignorant as to whether or not said complainant finds itself without ability to borrow money with which to make necessary additions and repairs to its property so as to maintain the same in condition to furnish an adequate supply of water to its customers, and allege that it has never made any effort, either by borrowing money or in any other manner, to put itself in condition to furnish an adequate supply of water to the inhabitants of Walla Walla or to the city itself. We deny that complainant will be irreparably damaged or damaged at all, either in the value of its property or in its sources of credit or otherwise, by the proposed action of said city in selling its bonds and building water works as by the ordinance mentioned is said bill of complaint proposed.

VII.

We deny that by its system of water works the complainant furnishes to the city of Walla Walla an adequate supply of water
50 and of sufficient pressure for all or any needful or proper purposes of said city at all points or at any points of said city of Walla Walla where the same is or may be needed. We deny that it furnishes to inhabitants of said city at a reasonable rate or at as low a rate as any maintained on the Pacific coast an ample supply of pure or wholesome water, and we allege that the present rates of said company were only adopted since the said city proposed to erect and maintain its own water works, and were adopted solely and only for the purpose of influencing the people of Walla Walla in their votes upon the question of the erection of water works; that prior to the time that said city proposed the erection of its own water works the water rates of said complainant were exorbitant and unreasonable, and should the city be prevented from erecting and maintaining its own water works these defendants believe that said complainants will immediately re-establish its former unreasonable and inequitable water rates.

We deny that there is no necessity for an additional supply of water of water to be furnished by the city. We deny that the action of the said city of Walla Walla or its officers in attempting to build competing water works is oppressive or unjust exercise of power or one which should be restrained by a court of equity. We deny that said action of said city is a violation of said pretended contract or of any contract, and deny that said alleged contract is

binding upon said city so as to prevent the erection of water works as is proposed. We deny that complainant's pretended rights under said alleged contract with the city of Walla Walla or its pretended right under said alleged contract to have the city of Walla Walla refrain from erecting, maintaining, or becoming interested in water

works other than the water works of plaintiff are of the value of fifty thousand dollars or any other whatever, and deny that complainant has any such rights under said pretended contract. We deny that complainant will be damaged in the sum of fifty thousand dollars or any other sum whatever by the repudiation of said alleged contract or by the erection of water works by said city. We admit that the said city of Walla Walla and its officers intended on the 30th day of January, 1894, to proceed to sell the negotiable bonds of said city for the purpose of erecting the said water works and to immediately commence the erection of the same upon the sale of said bonds, and we admit that unless restrained by this honorable court said city and its officers will proceed to negotiate their said bonds and to erect water works as by said ordinance provided. We deny that said acts or any acts or doings of the defendants or any of them are in fraud of any of complainant's rights, or that the same do deprive or tend to deprive the complainant of its rights under said alleged contract or any rights whatever, or that the same deprives or tends to deprive it of any protection guaranteed to it under said alleged contract or by the Constitution of the United States or otherwise.

VIII.

We submit that the city of Walla Walla has the right, power, and authority to erect said water works and to furnish said city and the inhabitants thereof with a supply of water as is contemplated and proposed by its ordinance hereinbefore mentioned; and we further submit that this court has no jurisdiction of the subject-matter in this action, and that the restraining order heretofore awarded against these defendants should be dissolved and that complainant's said bill ought to be dismissed with costs.

(Signed)

STRATTON, LEWIS & GILMAN,
T. W. DOVELL,

Solicitors for Defendants

52 (Endorsed on back as follows:) No. 103. In the circuit court of the United States for the district of Washington, northern division. Walla Walla Water Co., plaintiff, *vs.* City of Walla Walla *et al.*, defendant. Filed April 21st, 1894. A. Reeves Ayres, clerk, by W. H. Kirkman, deputy. Answer. T. W. Dovell and Stratton, Lewis & Gilman, attorneys for def'ts, 101-106, Occidental block, Seattle. Copy of within answer received and due service of the same acknowledged this 20th day of April, 1894. Turner, Graves & McKinstry, attorney- for complainant.

53 In the Circuit Court of the United States for the District of Washington, in Chancery Sitting.

THE WALLA WALLA WATER COMPANY, a Corporation Organized
and Existing under and by Virtue of the Laws of the State of
Washington, Plaintiff,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation, et al.,
Defendants.

This repliant, The Walla Walla Water Company, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is

54 true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

(Signed) TURNER, GRAVES & MCKINSTRY,
Solicitors for Plaintiff, Spokane, Washington, Review Building.

UNITED STATES OF AMERICA, }
State of Washington, County of Walla Walla, } ss:

Harry H. Turner, being first duly sworn, on his oath says that he is the secretary of plaintiff and as such officer of said corporation makes this verification for and on its behalf; that he has read the foregoing reply, knows the contents thereof, and verily believes the same to be true.

(Signed)

HARRY H. TURNER.

Subscribed and sworn to before me this 26th day of May, 1894.

(Signed)

W. G. VAN VALKENBURGH,

Notary Public in and for the State of Washington,

[SEAL.]

Residing at Walla Walla.

55 (Endorsed on back as follows:) No. —. In the circuit court of U. S., district — Washington. Walla Walla Water Co., plaintiff, vs. City of Walla Walla, defendant. Reply. Filed May 31st, 1894. A. Reeves Ayres, clerk, by W. H. Kirkman, deputy clerk. Turner, Graves & McKinstry, attorneys for plaintiff. Service of the within accepted this 31st day of May, 1894. W. T. Dovell, of attorneys for defendants.

56 In the Circuit Court of the United States for the District of Washington, Southern Division.

THE WALLA WALLA WATER COMPANY, a Corporation, Com-plainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City, and Robert G. Parks, the Treasurer of said City, and Daniel Stewart, John G. Muntinga, D. B. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of and Constituting the Council of said City, Defendants.

It appearing to the court that Wellington Clark, Esquire, the master in chancery of the above-entitled court for the southern division of the district of Washington, is disqualified to act as such master in the above-entitled cause, and the respective parties hereto, by their solicitors, having stipulated in writing that W. S. Davidson be appointed special master in chancery to take the testimony in said cause, which stipulation is on file herein—

It is ordered that the said W. S. Davidson be, and he is hereby, appointed special master in chancery to take the testimony in said cause and report the same to this court.

Dated Seattle, Wash., August 21st, 1894.

C. H. HANFORD,
U. S. District Judge.

(Endorsed: Filed August 22nd, 1894. A. Reeves Ayres, clerk, by W. H. Kirkman, deputy.)

57 In the Circuit Court of the United States for the State of Washington, Southern Division.

THE WALLA WALLA WATER COMPANY, Complainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation, et al.

To the Hon. C. H. Hanford, judge of the circuit court of the United States, district of Washington:

In pursuance of an order made in the above-entitled cause, dated August 21st, 1894 (a copy of said order is hereto attached), appointing the undersigned special examiner to take the testimony in said cause and report the same to this court, — beg leave to report that I did on the 24th day of Sept., 1894, in accordance with the stipulation filed in this cause for the taking of said testimony, all the parties appearing together with their respective attorneys, proceeded to take the testimony and continued the same from day to day until same was completed; said testimony was taken by a stenographer and by him transcribed, and afterwards caused all witnesses to appear, examine, and sign their testimony except those stated in the stipulation of attorneys hereto attached; which testimony is herewith returned, together with exhibits referred to in said testimony;

that before proceeding to take the testimony I took the oath prescribed by the statute, which is herewith attached, together with other papers in said cause; all of which is respectfully submitted.

WM. S. DAVIDSON,
Special Examiner.

58 In the Circuit Court of the United States for the District of Washington, Southern Division.

THE WALLA WALLA WATER COMPANY, a Corporation, Com-
plainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City, and Robert G. Parks, the Treasurer of said City, and Daniel Stewart, John G. Muntinga, D. B. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of and Constituting the Council of said City, Defendants.

I, Wm. S. Davidson, having heretofore been appointed special examiner to take the testimony in said cause, do solemnly swear that I will faithfully and impartially perform my duties as such special examiner, agreeable to the order of the court, to the best of my ability and understanding, so help me God.

WM. S. DAVIDSON.

Sworn to before me and signed in my presence this 24th day of Sept., 1894.

W. G. VAN VALKENBURGH.

[SEAL.]

Notary Public, Residing at Walla Walla, Wash.

(Endorsed: In the circuit court of the United States, district of Washington, southern division. The Walla Walla Water Co. *vs.* The City of Walla Walla *et al.* Oath of special examiner.)

59 In the Circuit Court of the United States for the District of Washington, Southern Division.

THE WALLA WALLA WATER COMPANY, a Corporation, Com-
plainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation, and
Others, Defendants.

It is stipulated by and between the counsel for the respective parties hereto that the testimony of F. M. Bowman, G. P. Winaus, L. H. Rogers, Henry Debus, A. J. York, Nathaniel Webb, John Dooley, Patrick Walsh, Edgar Broughton, J. Z. Smith, Samuel Cottrell, Peter Kauffman, and Oscar Huber, taken before Wm. S. Davidson, special examiner in this cause, as transcribed by the stenographer and now on file in the office of the clerk of this court, be re-

ceived and heard as if the same had been signed by each of said witnesses.

It is further agreed that said cause be heard before this court, at the city of Seattle, in the northern division of said district, on the 25th day of January, A. D. 1895.

TURNER, GRAVES & McKINSTRY,
Solicitors for Complainant.
W. T. DOVELL, For Defendants.

60 In the Circuit Court of the United States for the District of Washington, Southern Division.

WALLA WALLA WATER COMPANY, Complainant, }
vs. } Case No. —.
THE CITY OF WALLA WALLA *et al.*, Defendants. }

Messrs. Turner, Graves & McKinstry, attorneys for complainant.
Messrs. W. T. Dovell and L. C. Gilman, " " defendant.

Testimony Taken Before Mr. Wm. S. Davidson, as per Reference Filed Herein.

September 24th, 1894.—Now, at this date, this cause coming on to be heard, the time being fixed by the parties heretofore, appeared the attorneys of the respective parties, and by agreement the cause was continued until tomorrow morning at nine o'clock.

(Testimony taken by Victor Wilson, reporter.)

SEPTEMBER 25TH, 1894—nine o'clock a. m.

Court met pursuant to its adjournment of yesterday, all parties interested being present.

Counsel for complainant first offered in evidence the original articles of incorporation and the supplemental articles of incorporation of the Walla Walla Water Company filed August 16th, 1881, and January 11th, 1888, marked Complainant's Exhibit "A" and "B," respectively.

This was objected to by counsel for defendants on the ground that it is irrelevant, incompetent, and immaterial.

Testimony.

HENRY KELLING, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. State your name and occupation, Mr. Kelling.

Answer. My name is Henry Kelling, and I am city clerk.

Question. Were you city clerk of Walla Walla city during
61 the year 1887?

Answer. I was, sir.

Question. Do you recollect the city having enacted an ordinance during the month of March, 1887, directing the execution of a contract between the city of Walla Walla and the Walla Walla Water

Company for the supply of water to the city and inhabitants by the Walla Walla Water Company?

Answer. I remember the city ordinance, but I don't remember the month or year.

Question. Have you the ordinance book with you?

Answer. I have, sir.

(Counsel for complainant here offered in evidence a copy of the ordinance above referred to as printed.)

(COUNSEL FOR DEFENDANT:- We will admit that the city council of the city of Walla Walla on the 15th day of March, 1887, passed an ordinance entitled "An ordinance — supply of water for the city of Walla Walla," and that said ordinance is in the words and figures set forth in the complainant's bill of complaint.)

Question. Prior to the passing of that ordinance were you present at any council meeting in which the matter was discussed?

Answer. I was, sir.

Question. What discussions took place between two of the councilmen or any of them in regard to the sufficiency or insufficiency of the water supply?

(Counsel for defendant- objected to this question on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. Those who opposed the passing of the ordinance had the insufficiency of the water supply as one of their arguments against it.

Question. Was anything said with reference to the insufficiency of the water supply?

(Same objection.)

62 Answer. I don't know as there was. I don't think they were speaking of signing this contract.

Question. I am not asking about the signing of this contract.

Answer. That is the only way I could answer it. I say it was made as an objection.

Question. What was made an objection?

Answer. The insufficiency of the water to supply this contract.

Question. Was it admitted that the existing water supply was insufficient?

Answer. Not by a majority; no. The majority passed the bill.

Question. Was anything said in regard to that afterwards?

Answer. I don't know anything further than that.

Question. During that time when the ordinance was passed, in the early part of 1887, was the city generally well supplied with water and the inhabitants of the city?

Answer. That is my opinion.

Question. Were all the different sections of the city supplied with water?

Answer. Were all sections of the city supplied with water at that time? No, sir.

Question. Which sections were not?

Answer. The lower end here was not supplied with water nor that lower end.

(Counsel for complainant here offered in evidence a map of the city of Walla Walla.)

(COUNSEL FOR DEFENDANT:) This may go in, and if we find one more convenient we will substitute it. The map was thereupon marked Complainant's Exhibit "C.")

Question. Now, Mr. Kelling, go on and state all the sections of the city that were not supplied with water at that time to the best of your recollection.

Answer. To the best of my recollection this section here was not supplied with water.

Question. Describe it.

63 Answer. I don't think at that time that Ritz's addition was well supplied with water nor a portion of Rees' addition nor Chapman & Boyer's addition nor South Park addition.

Question. Were there any other additions that were not supplied with water?

Answer. I don't know whether they are to this day. Langford's and Butler's additions at that time were not supplied with water.

Question. And in the other part of the city?

Answer. I don't think Cain's addition was—that is, the upper portion of Cain's and Shauble's addition.

Question. In what part of the city is Cain's addition?

Answer. In the eastern. I mean the upper portion of Cain's addition and Shield's addition was not well supplied with water.

Question. Were there any other additions in the city that were not well supplied with water according to your present recollection?

Answer. Bryant's addition was not well supplied then and is not supplied now.

Question. You don't remember for a certainty whether those were the only districts that were not supplied with water—that is, to the best of your recollection?

Answer. That is the best of my recollection. That was quite a while ago.

Question. Do you know whether Shauble and Chase additions were supplied with water?

Answer. I don't know to a certainty; no.

Question. What is the best of your recollection on this point?

Answer. That a greater portion of them were not.

Question. Who executed the contract between the city of Walla Walla and the Walla Walla Water Company for the supply of water for the city of Walla Walla?

Answer. By the water company, by R. R. Rees, president of the company, and Alvah Brown, secretary, and by myself, as city clerk.

64 Question. Please examine this instrument and see if that is the contract referred to.

Answer. I couldn't tell without reading it all through. I know that is my signature.

Question. Is that the seal of the city?

Answer. Is that the seal of the city?

Answer. That is the seal of the city.

Question. Do you know that that is the signature of Alvah Brown?

Answer. I do, sir.

Question. And of R. R. Rees, president of the Walla Walla Water Company?

Answer. Yes, sir; that is the signature of Mr. Rees.

(Counsel for complainant here offered in evidence the contract between the city of Walla Walla and the Walla Walla Water Company, executed on the ninth day of May, 1887, above referred to by witness. This was received without objection and marked Complainant's Exhibit "D.")

Cross-examination.

Question. I understand you to say, Mr. Kelling, that in the council discussions it was considered by many that the source from which the water supply was taken was not sufficient to supply the city for the number of years covered by the contract.

Answer. That was one of the objections urged by the council.

Question. And by people generally?

Answer. I don't know.

Question. These parts of the city that you have mentioned as being without water at that time, into how many of them has water since been taken?

Answer. That I couldn't say, sir.

Question. You don't know what connections have been made?

65 Answer. No, sir.

(Witness excused.)

(Signed)

HENRY KELLING.

F. W. PAINE, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. State your name and place of residence.

Answer. My name is F. W. Paine, and I live in the city of Walla Walla.

Question. What is your business?

Answer. I am at present receiver of the Walla Walla savings bank.

Question. Do you remember in the spring of the year 1887 of the enactment of an ordinance by the city council of the city of Walla Walla directing the execution of a contract between the city of Walla Walla and the Walla Walla Water Company for the supply of water to the city?

Answer. I recollect the contract ; I couldn't fix the date ; I should say it was about that time.

Question. Do you remember the circumstances under which this contract was made, the conditions of the city at that time with respect to its water supply ?

Answer. Why, I recollect very well that there was a lack of water supply in some of the districts, particularly in mine.

Question. In what district do you live ?

Answer. In the southeast part of the city, in what is called Chase's addition.

Question. Do you know what was the general feeling of the inhabitants of the city with reference to the supply of water, as to its sufficiency or insufficiency ?

(This question was objected to by counsel for defendant- on the ground that is it incompetent and immaterial.)

Answer. It seems to me that there was a demand for more water ; that the supply was insufficient.

66 Question. Do you know whether the matter was generally discussed by the people or not ?

Answer. I can't say positively that it was generally discussed, but it was talked about a great deal that the city was lacking for water.

Question. Were any demonstrations made by the people in the manner of public demands for an increased supply of water ?

Answer. I don't know what might be considered public demand.

Question. Were there any public meetings held ?

Answer. Yes, sir ; there was one meeting that I recollect.

Question. Were you present at that meeting ?

Answer. I was.

Question. Do you know the object of that meeting ?

(This question was objected to by counsel for defendant- on the ground that it is immaterial.)

Answer. They discussed the situation for the water company to supply more water, as I recollect it.

Question. Was that meeting generally attended by the people ?

Answer. As I recollect it, there were quite a good many people there ; it was held in the council-rooms, if I recollect right.

Question. What took place at that meeting ?

(This question was objected to by counsel for defendant- on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. Not being interested particularly, I couldn't say positively.

Question. State as near as you can recollect it.

Answer. I think that it was discussed there by some of the council and by some of the prominent citizens who were anxious for a better supply of water that the city should enter into a contract with the water company for that purpose.

Question. Was it spoken of by different parties that sufficient water was not supplied ?

Answer. I can't say about that at that meeting, but it was frequently done about that time.

67 Question. When were these meetings held with reference to the making of a contract or the enactment of an ordinance?

Answer. Some time prior.

Question. Was it in the year 1887?

Answer. I can't say.

Question. This contract was made in May, 1887. Do you remember whether the meeting was held further back than the year 1887?

Answer. No; from my memory I couldn't tell.

Question. What is the best recollection that you have on that subject?

Answer. I should say it was three or six months prior to the formation of the contract.

Question. Now, are you familiar with the districts in the city of Walla Walla which were not supplied with water at the time of the making of this contract between the city of Walla Walla and the Walla Walla Water Company?

Answer. Well, I can speak for my own district principally.

Question. How large an area does your own district cover approximately?

Answer. There is quite a large neighborhood down there; it is, perhaps, one of the most thickly populated portions of the city.

Question. Was it thickly populated at that time?

Answer. No, sir; not so much as it is now, but a good many people were living there.

Question. Are you acquainted with Langford's addition with respect to its water supply?

Answer. Yes, sir.

Question. What were the conditions of that addition?

Answer. There was very little, if any, water over there.

Question. What other districts in the city were not well supplied with water at that time to the best of your personal recollection?

68 Answer. Well, I should say this northern part of the city, called Shauble's addition.

Question. Were there any other parts of the city that you remember of at the present time?

Answer. No; I can't say positively about the lower additions here, but I think there was a lack of water in Rees' addition.

Question. Was there no water at all in the districts you speak of or the additions you speak of?

Answer. There was a little water in the Chase district.

Question. You speak of a little water. What do you mean by that?

Answer. There was a small pipe, possibly an inch and a half pipe, supplying three or four neighbors and myself. I complained a good deal about the small supply, because I laid the pipe myself mostly, and when it was connected to by my neighbors I took exceptions.

Question. Did you measure that pipe?

Answer. No, sir; I didn't.

Question. At the present time, Mr. Paine, are you sufficiently supplied with water?

Answer. Yes, sir; I have no complaint to make. I have all the water I want.

Question. Since when have you received a sufficient supply of water?

Answer. Since the putting down of that main that this company put down, I think, five or six years ago. I don't know; perhaps it was longer.

Cross-examination:

Question. You stated that there was some public feeling at that time that the water supply wasn't sufficient.

Answer. Yes, sir.

Question. Were there any such feeling at that time?

(Counsel for complainant objected to this question on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. It might be considered so. As I qualified my statement in the other case, I am not competent to say as to public sentiment. I have seen nothing in the way of public meetings.

Question. There was an election which indicated pretty well what kind of a feeling there was, was there not?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I couldn't say.

Question. A majority of the people voted in favor of the new water company, did they not?

(Same objection as to last question.)

Answer. They did.

Question. Mr. Paine, you spoke of Chase's addition as a portion of the city that was not supplied with water at that time. You yourself are living in that section?

Answer. Yes, sir.

Question. And your water supply was insufficient until the water company put in a four-inch main?

Answer. Yes, sir.

Question. Do you know whether there is in Chase's addition at the present time?

Answer. You made me say a four-inch main. I said until the present main was laid down.

Question. Are you aware of the fact that in Chase's addition there is not at the present time any main except of four inches diameter?

Answer. I don't know what the size is.

Question. Is there not a considerable portion of Chase's addition that is still unsupplied with water—quite a thickly populated portion?

Answer. I don't know as to that; there might be.

Question. Do you know Maple street, in Chase's addition?

70 Answer. Yes, sir.

Question. There are people living on that street in considerable numbers?

Answer. Yes; I saw quite a number of houses along that street.

Question. Is there any water on that street?

Answer. I don't know, sir.

Question. Now, what other portion of the city did you refer to as unsupplied with water in 1887?

Answer. In Langford's addition there was a very little supply.

Question. Now, Mr. Paine, have you never had any difficulty in obtaining a sufficient supply of water where you reside for domestic and irrigation purposes?

Answer. I have sometimes been a little short on irrigation, but never for domestic purposes. In former years I have, but not this year.

Question. Irrigation is almost absolutely necessary in this city for health and comfort, is it not?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial, because the witness has not shown himself competent and qualified to testify.)

(Question not answered.)

Question. Lawns in this city and vegetation, shrubbery, and trees will not grow in this city, will they, without irrigation?

Answer. Not many lawns in some portions of the city.

Question. Generally speaking?

Answer. Not generally speaking. A large portion of the city in our neighborhood have to have water on lawns.

Question. And in the summer season it is extremely dusty here where the streets are not sprinkled?

Answer. Yes, sir.

Question. How long have you been a stockholder of the complainant in this case?

71 Answer. A very short time.

Question. Were you at the time of the public meeting that you spoke of?

Answer. No, sir.

Question. Prior to that or subsequent?

Answer. Subsequent.

Question. Do you know by whom those meetings were procured—who agitated the holding of the meetings at that time?

Answer. I can't name the individuals; no, sir.

Question. Were not the individuals those who were acting in the interests of the water company?

Answer. I can't say now.

Redirect examination :

Question. Are you at present a stockholder in the Walla Walla Water Company?

Answer. No, sir.

(Witness excused.)

(Signed)

F. W. PAINE.

F. M. BOWMAN, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. Give your name.

Answer. F. M. Bowman.

Question. What is your business?

Answer. Plumber and gas-fitter.

Question. How long have you been engaged in plumbing and gas-fitting?

Answer. About twelve years here.

Question. About twelve years in this city?

Answer. Yes, sir.

Question. Have you ever been employed by the Walla Walla Water Company to construct for them any works or improvements for the city of Walla Walla?

72 Answer. Yes, sir.

Question. During what years?

Answer. I have been for the last four or five years; in fact, I laid all their mains.

Question. Now, I will call your attention to the 9th of May, 1887, when the contract was made between the City of Walla Walla and the Walla Walla Water Company for the supply of water to the city and inhabitants. Do you remember the making of that contract?

Answer. I don't know anything about the contract personally.

Question. You know the terms of the contract and the fact that it was made?

Answer. By hearsay; that is all.

Question. I will call your attention to work done by you for the water company from May, 1887, to the present time, and will ask you how often you have been employed by the water company on different contracts, if you know.

Answer. I don't know how I could answer that question. I was hired by the company and worked every year, more or less, since the mains were laid.

Question. At different times during those years?

Answer. Yes, sir.

Question. What works did you construct for the Walla Walla Water Company during those years? You can commence and describe in detail all the work you have done for the Walla Walla Water Company since May, 1887, to the present time and make use of the map to illustrate the works and improvements, if any you have made. What was the first work done by you since that time?

Answer. Well, I am not positive as to that. I think the first work was down Birch street, starting from First street.

Question. At what point?

Answer. At the intersection of Birch and First.

Question. Describe the location the best you can from the map, so the stenographer can take it down and so it can be understood exactly where these mains were laid. You say that
73 main started from the intersection of Birch and First street?

Answer. Yes; and run down Birch.

Question. To what street?

Answer. It runs into the grounds of the Sisters of Charity.

Question. Does it run across Fifth street?

Answer. Across Fifth street down to this.

Question. To the center of the land owned by the Sisters of Charity?
ity?

Answer. Yes, sir; on the line of Sixth street.

Question. What were the dimensions of that main?

Answer. Six inches.

Question. Six inches by what?

Answer. It is a round pipe.

Question. What is the character of the pipe?

Answer. It is good.

Question. What kind of a pipe is it?

Answer. It is a Kalemime pipe.

Question. How many feet long is that pipe?

Answer. I couldn't answer that question.

Question. To the best of your recollection, in what year was that work done?

Answer. I think the work was done in 1877.

Question. 1887, do you mean?

Answer. I mean 1887.

Question. What other work was done by you subsequent to laying of that main for the water company?

Answer. There was a main run down Alder street.

Question. Describe its location.

Answer. I didn't finish this six-inch main that run down Chase avenue close to where Mr. Paine is living.

— Was there any other main connecting with this Birch Street main?

Answer. With this Birch Street main.

Question. Where was this other main laid that you just
74 described?

Answer. A main was laid on Sixth street, from the corner of Birch and Sixth, extending to—I couldn't describe it.

Question. How many blocks and streets from the center of the Sisters of Charity property, and in what direction was this other main laid?

Answer. About five blocks.

Question. In what direction?

Answer. Running north.

Question. Along what street?

Answer. Along Sixth street.

Question. With what did that main connect?

Answer. It connects with a stand pipe.

Question. Don't you know at the intersection of what streets that stand pipe was constructed?

Answer. It is not at the intersection of two streets. It is at the intersection of Sixth street and an alley.

Question. Do you know the name of the alley?

Answer. No, I don't know it.

Question. See if you can find it on the map. Between Sumach and Cherry streets—is that the stand pipe?

Answer. Yes, sir.

Question. On the corner of Sixth street and the alley between Sumach and Cherry street—is that it?

Answer. That is right.

Question. When was that stand pipe constructed?

Answer. I think that was in 1887.

Question. Of what is it constructed, and what are its dimensions?

Answer. I never measured the height of it, but I always understood that it was seventy-five feet high and eighteen inches in diameter.

Question. Under whose superintendence was all this work done by you?

Answer. Under the superintendence of J. F. Bowman.

75 Question. Of what is that pipe constructed?

Answer. Sheet iron.

Question. Was any other stand pipe constructed by you for the Walla Walla Water Company?

Answer. One other.

Question. Where and when was that built?

Answer. About the same time, in the ground of the Sisters of Charity.

Question. In the center of those grounds?

Answer. Yes, sir; in the center.

Question. What are the dimensions of that stand pipe?

Answer. The same as the other one.

Question. Of what is it constructed—of what material?

Answer. Iron.

Question. Do you know what kind of iron?

Answer. It is sheet iron—boiler iron.

Question. How many feet high is that stand pipe?

Answer. I understand it was seventy-five feet high.

Question. You mean that you understand so?

Answer. That is what the superintendant told me, I believe.

Question. Didn't you construct it?

Answer. I put it up.

Question. What would be your own idea of the height of that stand pipe without actually making a measurement of it—have you any idea of its height simply by examining it?

Answer. No, sir; none further than it is over sixty feet high; I am positive of that.

Question. Did you do any other work for the Walla Walla Water Company within the times I have already specified since May, 1887, to the present time?

Answer. Yes, sir.

Question. Will you describe in detail, by reference to the map, all the other work which you have done for the Walla Walla Water Company, under its directions, during these years?

Answer. I don't know hardly how. There was a pipe laid;
76 this pipe here from Sixth street, from the stand pipe on Sixth street.

Question. Which stand pipe?

Answer. The one between Sumach and Cherry.

Question. Commencing there and extending where?

Answer. Up the alley to Fifth street.

Question. Is that the alley between Sumach and Cherry street?

Answer. Yes, sir.

Question. And then where?

Answer. Then running from the corner of the alley to Sumach and up Sumach street to Fourth street out to Elm, and from Fourth street at Elm to Ninth street.

Question. From Elm, how do you mean to Ninth street?

Answer. No; on Elm to Ninth street.

Question. What were the dimensions of that main?

Answer. Up the alley, up Fifth, and from Fifth to Sumach is four inches; on Sumach to Fourth street is six inches and from Fourth street to Elm, down Elm to Ninth, is four inches.

Question. That main stops, then, at Ninth street?

Answer. No, sir; it runs out Ninth street.

Question. About how far, as near as you can recollect?

Answer. Well, I should judge the four-inch main continued over one thousand feet further on Ninth street.

Question. I don't remember whether you described the dimensions of the main you referred to as having been first constructed for the company, which extended from Birch to the Sisters of Charity property and from there down Sixth street. What are the dimensions of that main?

Answer. Six inches.

Question. All of it?

Answer. Yes, sir.

Question. Of what material are these mains constructed? If of different material, let us know.

Answer. The six-inch main is Kalamime pipe. A portion of the four-inch pipe is sheet-iron pipe, riveted; a part of it is screwed pipe.

77 Question. Have you used this kind of pipe at other times for their work?

Answer. Yes, sir.

Question. For your construction-work?

Answer. Yes, sir.

Question. What is the character of that pipe as to its being good or bad, strong or weak?

Answer. Its character is good.

Question. Have you used the No. 2 Matthewson pipe for any of those mains?

Answer. Yes, sir.

Question. For what mains?

Answer. The main laid on Tukanon from Boyer's avenue to Cherry street.

Question. From Boyer's avenue to what street?

Answer to Cherry street.

Question. Now, what other mains have been laid by you, if any? I will try and refresh your recollection. What mains have you laid in Cain's addition, if any?

Answer. I laid this one here on Touchet street, commencing in Boyer avenue.

Question. Describe where it commences and where the main extends to.

Answer. A twelve-inch main commences at the North reservoir, on H. P. Isaac's grounds.

Question. And extending in what direction?

Answer. I can't say what direction, but north, I should call it; then running down Boyer avenue to the intersection of Boyer's avenue with Main street; Palouse, I should say.

Question. In what direction did it then extend?

Answer. It extended north.

— Along what street?

Answer. Along Palouse.

Question. Well, where did it then go?

78 Answer. It went then to the intersection of Moore street and Second.

Question. In what addition?

Answer. Shiel's addition.

Question. Where did that main then extend?

Answer. On Moore street to Ninth, and then it went out on Ninth street. It was twelve inches running down to about the middle of Boyer's avenue; then it was reduced to eleven inches, and near the corner of Main street and Palouse and on Palouse street it is ten inches near Cherry.

Question. Well, go on.

Answer. And from there it is a six-inch main down to Ninth street.

Question. And of what material is it constructed?

Answer. It is a steel-riveted pipe.

Question. What make; do you know?

Answer. No; I don't know.

Question. Is it a No. 2 Matthewson?

Answer. No; it is a steel-riveted pipe.

Question. Do you know the number of the pipe?

Answer. No, sir; I don't.

Question. Do you know where the pipe was procured?

Answer. My impression is that it was bought in Portland.

Question. You don't know what make it is?

Answer. No, sir.

Question. All those mains were of the same material as the last main you have described as coming from the North reservoir?

Answer. I believe so, sir; that is my impression.

Question. What other mains, if any, have you constructed for the water company? Have you described any yet on Fourth street?

Answer. I have given Fourth street.

Question. On Alder street?

Answer. There is a six-inch main laid on Alder street.

79 Question. Between what points?

Answer. Between First and Tenth street.

Question. On Howard street?

Answer. Yes, sir.

Question. What sized main, if you know?

Answer. A six-inch main was laid on Howard street.

Question. Between what points?

Answer. Between Whitman and Lincoln and Grove to Washington.

Question. Well, described the dimensions and material of this main.

Answer. That is a six-inch main, sheet-iron pipe.

Question. Do you know the character of the pipe—its make?

Answer. It is a heavy sheet-iron pipe, riveted.

Question. Do you know the number?

Answer. No; I don't.

Question. Didn't you lay a main on East Alder street?

Answer. Yes, sir.

Question. What is the size of that main?

Answer. It starts with a twenty-inch main.

Question. Do you remember when this main was laid?

Answer. I think it is three years ago.

Question. In 1891?

Answer. I am not quite positive.

Question. Was it in 1891 or 1892—either one or the other of those two years?

Answer. I can't speak positively as to that; I took no minute of it.

Question. Between what points did that main start?

Answer. Well, it started in the company's grounds—some distance in—and run out to East Alder street.

Question. What company's grounds?

Answer. The Walla Walla Water Company's grounds.

Question. What part of them?

80 Answer. In the northeastern part of them.

Question. In what addition is that main? Describe it with reference to the map.

Answer. It starts over on the east side of Reed's addition.

Question. At the point marked "gate"?

Answer. Yes, sir.

Question. Extending in what direction and how far?

Answer. I don't know the length of it, but it runs over to Alder street and down Alder street to First street.

Question. It runs down Alder street and runs parallel with Main for some distance until it reaches First street?

Answer. That is right.

Question. Where does it go from that point?

Answer. It is connected there with the main.

Question. With the First Street main?

Answer. With the First Street main.

Question. How many mains are there between Birch and Main street connecting with the First and Sixth Street mains?

Answer. One.

Question. Now, Mr. Bowman, I want to call your attention to the connections between the main on First street and the main on Sixth street. Upon how many streets from Birch to Main, including both Birch and Main, are connections made with the main on First street and the main on Sixth street? Just look at the map to refresh your memory.

Answer. Well, there are three.

Question. Specify them; on what streets are they?

Answer. One is on Birch street and one on Alder street and one on Main street, all connected on Sixth street.

Question. When were those mains constructed, to the best of your recollection?

Answer. Well, I couldn't say; somewhere, I think, either in 1888 or 1889.

Question. You can't state any more definitely?

Answer. No, sir; I can't.

81 Question. Now, do you remember any other mains that were laid by you for the Walla Walla Water Company which you have not yet described?

Answer. Yes, sir. There was a main laid on Chase avenue, a four-inch main.

Question. It is between Birch street and Jones street, isn't it, on Chase avenue?

Answer. Yes, sir.

Question. Does it connect with those two streets?

Answer. It is an extension of the six-inch main.

Question. Well, the Birch street six-inch main?

Answer. Yes, sir. It runs to Chestnut street and on Chestnut street. I think, to Sprague street.

Question. Is that part of the city inhabited thickly or not?

Answer. Yes, sir.

Question. Was there a main laid by you on Jones and Eagan avenue?

Answer. Yes, sir.

Question. During what year or between what years, as near as you can recollect?

Answer. Well, I can't speak positively about that, what year it was.

Question. Have you any idea?

Answer. No, sir.

Question. What is the character of that main?

Answer. It is a four-inch main.

Question. Of what material was it made?

Answer. A portion of it is four-inch lap-weld drive-pipe, we call it.

Question. What kind of a pipe is a lap-weld pipe—steel or iron?

Answer. Iron, I suppose.

Question. Do you know anything about the size or weight of the pipe?

82 Answer. About sixteenth iron, I should judge.

Question. You don't remember?

— No; I don't remember.

Question. Did you lay a main on Dr. Newell street?

Answer. Yes, sir.

Question. Between what points and connecting with — mains?

Answer. Connecting with the First Street main; then running to Second street; then up Second street near Walnut and near Eagan avenue.

Question. Of what dimensions?

Answer. Four inches. That four-inch main has been since extended to Chestnut street, and then extended again to, I believe it is, Maple street; yes; it is Maple street.

Question. Did you describe a main on Jones street and Eagan avenue?

Answer. I gave that awhile ago.

Question. On South Third street what main was constructed?

Answer. A four-inch main on South Third street.

Question. Of what dimensions?

Answer. This was a four-inch Matthewson pipe.

Question. In what year was that laid; do you remember?

Answer. I think that was laid in 1890.

Question. On Chestnut street what sized main was constructed?

Answer. It is a four-inch main.

Question. Of what material?

Answer. This is the same, a four-inch Matthewson pipe.

Question. On South Second street?

Answer. I just gave that on South Second; it is a four-inch Matthewson pipe.

Question. And this Chestnut Street main?

Answer. It runs from Second near Fourth.

Question. On Chestnut street?

Answer. Yes, sir.

Question. Now, on Main street.

83 Answer. You asked me about the main on Third street.

Question. Yes.

Answer. It runs from Birch near Eagan avenue, between Eagan avenue and Stahl's avenue.

Question. Is that also a Matthewson No. 4?

Answer. It is a No. 2.

Question. Is it a four-inch pipe?

Answer. Yes, sir.

Question. Of what material is that—iron or steel?

Answer. Iron, I think it is.

Question. On South Second street, could you describe that main?

Answer. Yes, sir; that runs to Maple street.

Question. And on Main street and East Main street? I don't remember whether you described them or not.

Answer. From the intersection of Boyer's avenue and Palouse street it is an eight-inch main to the intersection of First and Main. That is a steel-riveted pipe.

Question. On Madison street—I think you described that main.

Answer. No, sir; that runs from Whitman near Dr. Newell, and is a four-inch Matthewson.

Question. Do you remember the number?

Answer. No. 2.

Question. And on East Sumach street and North Third; what mains were constructed there by you?

Answer. On North Third street there was a four-inch main laid from Cherry and Third.

Question. To what point?

Answer. To Oak street, I think.

Question. Now, are those all the mains which you have constructed for the water company?

Answer. No, sir; there is one on Palouse street; a four-inch main.

Question. Between what parts of Palouse street?

Answer. Between Alder and Birch.

84 Question. Do you know what material that main was constructed of?

Answer. It was a four-inch Matthewson No. 2.

Question. Is there any other main?

Answer. Yes, sir; there is one on Rose street from Sixth, starting at the intersection of Rose and Sixth, to Tenth street. That is heavy lap-weld screwed pipe.

Question. And of what dimensions?

Answer. Four-inch pipe.

Question. I will read off the list and see if it suggests any other main on any of the streets that you have not yet described: Sumach street to stand pipe; Sixth to Elm?

Answer. I described that at first.

Question. Sixth to Elm?

Answer. I run a six-inch to Birch street, and from the stand pipe to Elm I run a six-inch pipe also.

Question. From Elm to Ninth?

Answer. I described that; it is a four-inch main.

Question. Ninth to Moore and Tenth?

Answer. I didn't go to Tenth street. I went to Moore street.

Question. From Moore to Tenth; is there a main there?

Answer. Yes, sir.

Question. Of what dimensions?

Answer. It is a four-inch main to Moore street.

Question. Does it stop at Tenth street?

Answer. It was continued through the grounds to the jute mill.

Question. At the penitentiary?

Answer. No; to the jute mill.

Question. The main to the jute mill I don't think you have described yet. When was that laid?

Answer. I couldn't say positively when it was laid.

Question. Does that pipe run to the city limits from Moore to Ninth and from Ninth to the penitentiary?

85 Answer. Yes, sir.

Question. Now, is there a main on Boyer avenue?

Answer. I described that; that is the main from the reservoir.

Question. Touchet street and Fourth street, North Fourth street, South Fourth street, and Alder and East Alder, Howard and Washington and Lincoln?

Answer. It is a four-inch main on Washington street between Grove and Park.

Question. What kind of a pipe?

Answer. I can't say positively, but I think it is a sheet-iron pipe.

Question. A four-inch pipe, did you say?

Answer. Yes, sir.

Question. On Lincoln street?

Answer. I gave that.

Question. Grove street?

Answer. Down to Washington. I described that.

Question. Park street, Dr. Newell, Birch, Palouse, Chase, and Eagan avenue, South Third, Chestnut street, South Second, Main street, East Main street, Madison street, East Sumach, North Third street. I think you have described the mains on all of those streets?

Answer. Yes, sir.

Question. Isn't there another main on Palouse street which you did not describe? You described a main on North Palouse street, but not the other one.

Answer. No, sir; I believe not.

Question. Just describe again the mains on Palouse street.

Answer. Well, the large main comes from the reservoir and runs down Boyer avenue to Palouse street.

Question. South Palouse street?

Answer. It is a four-inch main on South Palouse, from Alder to near Birch.

86 Question. From Alder to near Birch on South Palouse?

Answer. Yes, sir.

Question. Now, there is a main on Howard, isn't there—another main? Isn't there another main on South Palouse street, further south than the main you have described?

Answer. Yes, sir.

Question. Just describe that main.

Answer. I don't know whether I can locate the starting point or not.

Question. Can you by reference to the map?

Answer. I expect I can. It starts from Whitman and runs to Craig street.

Question. In what addition is Craig street?

Answer. It is in Robert's addition.

Question. From Whitman street to what street?

Answer. It runs through Craig street.

Question. Isn't there a main on Washington street, running from Howard to Grove, which you have not described yet?

Answer. On Washington, from Howard to Grove?

Question. Yes; over the property of George T. Berry.

Answer. Yes; there is a four-inch main from Howard to Grove street on Washington.

Question. Of what material—do you remember?

Answer. A portion of it is No. 2 Matthewson and a part of it is heavy screwed pipe.

Question. What is the character of this iron pipe that has been used, as you have described, on some of those mains—heavy iron pipe?

Answer. Yes, sir.

Question. Do you remember the number?

Answer. No, sir; I do not. I never took the number and I never measured it.

Question. It is all heavy iron pipe, is it?

Answer. Yes; it is heavy iron pipe.

Question. You have never paid much attention to the
87 kind of pipe—its make?

Answer. No, sir.

Question. Do you know the Matthewson No. 2 pipe? Have you ever measured its strength or do you know what pressure it will stand?

Answer. No, sir; I do not.

Question. Have you ever used it for any other purpose than the connecting of those mains for the water company?

Answer. No, sir.

Question. I understood you to say that all of those mains have been laid subsequent to May, 1887. Is that a fact?

Answer. Yes; all I have described.

Question. And up to what year were they laid?

Answer. The last I laid in 1893.

Question. In what part of the year 1893 were the last of those mains laid, to the best of your recollection?

Answer. I can't answer that question.

Question. You don't know whether it was in the summer or fall or spring?

Answer. I can't answer that positively.

Question. But it was some time in 1893?

Answer. Yes, sir. There is one more main that I have not given—that is, on Fifth street, running from Main street to Rose—a four-inch main.

Question. Of what material—a heavy iron pipe?

Answer. It is a No. 2 Matthewson.

Question. Are you able to say what mains were laid and owned by the Walla Walla Water Company prior to May, 1887?

Answer. I don't know whether I could answer that question or not.

Question. Well, state, as near as you can, what mains belonged to the plant of the Walla Walla Water Company, on what streets of the city mains were laid and owned by the water company prior to May, 1887.

Answer. Well, there was a main on Whitman street, running to First street, down First to Main, and there was a main on Main street here.

Question. Were there any stand pipes then constructed?

Answer. No, sir.

Question. What reservoirs did the Walla Walla Water Company then own?

Answer. They owned the North and South reservoirs.

Question. And what other one?

Answer. On what we call the Bush place.

Question. Did you build any improvements from those reservoirs to town prior to 1887 for the Walla Walla Water Company?

Answer. Yes.

Question. Did you build all the mains for the water company prior to this year?

Answer. Yes, sir.

Question. State, then, to the best of your recollection, what mains had been laid at that time, prior to the date already referred to—May, 1887.

Answer. Well, we started a sixteen-inch main from the South reservoir and run down to Whitman street. I did describe that; we started that sixteen-inch main at the reservoir.

Question. Just describe it as it then existed.

Answer. That is the way.

Question. From the reservoir to what point?

Answer. To Main street.

Question. Has that main since been replaced?

Answer. No, sir.

Question. It stands now just as it did then—a sixteen-inch main?

Answer. Yes, sir; it is a six-inch main where it connects on Main street.

Question. What other mains were then in existence—on what streets?

Answer. There was a main on Main street running from the North reservoir.

Question. Along what street?

Answer. Along Main street. It run down this county road and struck Main street and come down Main street to near Sixth street.

Question. Did that main connect with the main from the other reservoir?

Answer. Yes, sir.

Question. By what connection?

Answer. There is a connection on First and Main; they are all connected with First and Main.

Question. Has that main since been replaced or disused?

Answer. On the principal part of Main street itself.

Question. And supplied by what?

Answer. By a larger main.

Question. The twenty-inch main?

Answer. No; the twelve-inch main.

Question. What size was the first one originally placed there?

Answer. It was a six-inch main.

Question. Do you remember of what material it was?

Answer. It was a sheet-iron pipe.

— Were there any other mains in the city at that time?

Answer. Well, there were mains on Alder street and on Birch street; small ones.

Question. What sizes?

Answer. On Alder street it was a two-inch pipe.

Question. In describing these different mains now, Mr. Bowman, you may go on and state what size they are, of what material, and so on. As you describe them now describe on what other streets mains have been laid prior to the date of this contract.

Answer. There was one on Birch street, a two-inch pipe, running, I think, to Fourth street. Down Chase avenue from Fourth there was an inch and a quarter pipe.

Question. Has that been replaced?

90 Answer. Yes; by a six-inch main.

Question. Now, go on and describe the rest of the mains which were then in existence, and if they have been replaced or supplied by others state the fact, and also the size of the mains that replaced them.

Answer. I couldn't name any others just now.

Question. Well, to the best of your recollection or memory, on how many other streets were there mains, in addition to those you have already described as being in existence?

Answer. This pipe on Second street, running from First street to Second, a two-inch pipe, was replaced by a four-inch pipe; also on Second street the two-inch pipe was taken up and a four-inch pipe put down.

Question. Was there a main on Sumach street to where the stand pipe now is prior to May, 1887?

Answer. Not to the stand pipe.

Question. At the place where the stand pipe now is?

Answer. No, sir; there was a two-inch pipe on Sumach street, but it didn't run any further than Fifth street, I don't think. On Sumach street, there was a portion of that was a two-inch pipe, and part of it was an inch and a half pipe running from Second to Sixth street.

Question. In general, what has become of the old mains in use prior to May, 1887, by the Walla Walla Water Company?

Answer. There are not many of them in use now.

Question. Have they been replaced by the pipes and mains which

you have already described as having been laid subsequent to May, 1887?

Answer. The pipe on Main street has not been replaced.

Question. Is that the only one that has not been replaced?

Answer. There is one on Park street, a four-inch pipe, that has not been replaced.

91 Question. Are those the only others that have not been replaced since that date?

— Let's see. There is a four-inch pipe on Tukanon street, running from Main to near Sumach, that has not been replaced.

Question. But as a general rule most of the old pipe has been replaced by these new mains?

Answer. Yes, sir.

Question. Have any additional mains been laid since May, 1887, on streets where there were no mains prior to that date?

Answer. Yes, sir.

Question. About what proportion of the mains that you have described as being constructed after May, 1887, are new mains—that is to say, constructed on streets where there were no mains prior to that date—as near as you can recollect?

Answer. I can't hardly answer that question.

Question. Have you any idea at all as to the number of miles of pipe that was laid prior to May, 1887?

Answer. No, sir.

Question. Can you make any comparison between the number of miles of pipe then laid and the number of miles of pipe and mains that are now used and owned by the Walla Walla Water Company?

Answer. Well, I should judge there was over double the amount now.

Question. And in general what were the dimensions of the old pipe used by the water company—that is to say, used and owned prior to May, 1887?

Answer. The majority of them were small pipes.

Question. Of what size?

Answer. Well, all the laterals were two inches, an inch and a half, and inch and a quarter pipe.

Question. What was the largest pipe then used for any of those mains owned by the Walla Walla Water Company?

Answer. Well, the largest main was one that runs from the South reservoir. It started an eighteen-inch main and run
92 down to six inches.

Question. And most of those mains were constructed of sheet iron at that time?

Answer. Yes, sir; except this two-inch pipe. Of course, that was screwed pipe.

Question. Now, Mr. Bowman, describe once more the capacity and dimensions of the principal mains commencing at the reservoirs, now owned by the water company.

Answer. Well, from the South reservoir, I have already described that.

Question. The North reservoir as compared with the old mains ?

Answer. From the North reservoir I have already described that at one time it was a twelve-inch main.

Question. Are there two mains from the North reservoir now ?

Answer. No, sir ; only one.

Question. Of what dimensions ?

Answer. Twelve inches running down to ten.

Question. Isn't there a twenty-inch main ?

Answer. From the South reservoir.

Question. Do you know what is called the infiltration chamber belonging to the water company ?

Answer. No, sir.

Question. The ditch through the company's property on Bush's ground, did you see that ?

Answer. I knew there was one constructed there, but I didn't work on that.

Question. Do you know when it was constructed ?

Answer. When ?

Question. Yes.

Answer. I think it was about either three or four years ago.

Question. Do you know the size of the pipe that connects with that ditch ?

Answer. Twenty-inch.

93 Question. Did you have anything to do with the construction of the main ?

Answer. With the main—yes, sir.

Question. When was that laid, to the best of your recollection ?

Answer. I couldn't say whether three or four years ago.

Question. About that time ?

Answer. Yes ; it was about that time.

Question. You have already described that, have you not ?

Answer. Yes, sir.

Question. For how long is it a twenty-inch main—for what distance ?

Answer. I think about eighteen hundred feet.

Question. And that is entirely new ?

Answer. Yes, sir.

Question. It didn't replace any old main ?

Answer. No, sir.

Question. The ditch was dug subsequent to May, 1887 ?

Answer. I don't know when the ditch was dug, but the pipe was connected subsequent to that date.

Question. There was no pipe before that date ?

Answer. No, sir.

Cross-examination :

Question. You have laid all the pipe for this water system since its inception to the present time, have you not ?

Answer. About all—yes, sir.

Question. What is the largest size main in existence at the present time ?

Answer. A twenty-inch main, I think.

Question. And what length have you a twenty-inch main?

Answer. I can show you on the map. I couldn't tell you exactly the length.

Question. Approximately.

Answer. I should judge eighteen hundred feet of it or more.

94 Question. And the next largest?

Answer. Then it comes down to eighteen inches.

Question. To eighteen inches?

Answer. Yes, sir.

Question. And the next?

Answer. It is a twelve-inch main.

Question. And the next?

Answer. It is a ten-inch main—that is, it started eighteen inches at the reservoir and gradually decreased. Some of the way it is twelve inches and runs down to ten.

Question. This main that is twenty inches is gradually reduced to ten inches on Alder street?

Answer. It starts twenty inches and is reduced to eighteen and connects with a six-inch main on First street.

Question. Is that reduced to eighteen inches or sixteen inches?

Answer. To eighteen inches.

Question. Now, what kind of pipe are the eighteen-inch, twenty-inch, and twelve-inch mains?

Answer. Steel-riveted pipe.

Question. All steel?

Answer. That is, it is supposed to be all steel. That is what they call for. I don't know anything about that. I know it is a riveted pipe, but I couldn't say whether it is a steel pipe.

Question. Couldn't you yourself tell a steel pipe from an iron pipe?

Answer. No, sir; I couldn't; cheap steel.

Question. Of what material or what kind of pipe were your six and four inch mains?

Answer. Well, the majority of them were Kalamime and Mathewson pipe. Some were made of sheet iron, riveted. Some were screwed.

Question. Are there any fire-hydrants connected with your six and four inch Kalamime pipe?

Answer. Yes, sir.

95 Question. There are fire-hydrants connected with your four-inch Kalamime pipe, are there?

Answer. There is one on the corner of Sumach and Touchet, I think. No; it is on Palouse.

Question. Any others?

Answer. Six-inch or four-inch?

Question. Four-inch Kalamime pipe.

Answer. There is one on Second and Chestnut street.

Question. Are there others?

Answer. On the corner of First and Dr. Newell.

Question. Can you name any others?

Answer. That is all, I believe, of the Kalamime.

Question. Are there any fire-hydrants connected with your four-inch Matthewson pipe?

Answer. Yes, sir.

Question. A considerable number?

Answer. The majority of them. The majority of the four-inch pipe—Matthewson pipe—were used to connect hydrants with the mains.

Question. And the majority of the fire-hydrants in the city are connected with four-inch pipes, either Kalamime or Matthewson?

Answer. You mean four-inch mains?

Question. Four-inch mains; yes, sir.

Answer. I can't positively answer that question; I think not.

Question. A great many are, however?

Answer. A great many. Those on Birch and Poplar, of course, are six-inch.

Question. What is the diameter of the connection used between these mains and the fire-hydrants?

Answer. Four-inch.

Question. What is the diameter of the outlets of the hydrants?

Answer. I can't answer that.

Question. You have seen the fire-hydrants?

Answer. Yes, sir.

Question. In your judgment, what is the size?

96 Answer. One, I think, is four inches, and the others from two to two and a half.

Question. The suction outlet is four inches, isn't it?

Answer. I think it is.

Question. How does the diameter of the Matthewson pipe and the Kalamime pipe measure—internal or external diameter?

Answer. Internal.

Question. Are you sure about that?

Answer. No, sir; I should call it internal measurement.

Question. Is the pipe designated as No. 2 Matthewson pipe four inches in its internal or external diameter?

Answer. I couldn't answer that.

Question. About what is the thickness of the Kalamime and Matthewson pipe?

Answer. It is about No. 12 English wire gauge; all iron is numbered by the gauge.

Question. Can you give me the thickness of this pipe in inches or fractions of an inch?

Answer. No, sir; I cannot.

Question. Can you give an estimate of it? Having seen so much of it, can't you tell about its thickness?

Answer. Between an eighth and sixteenth, I suppose, somewhere.

Question. That is, it is not more than an eighth of an inch thick nor less than a sixteenth?

Answer. No; an eighth and a sixteenth.

Question. That would make three-sixteenths?

Answer. Yes; I never measured one in my life.

Question. Have any mains been laid in the streets of the city since the year 1887 less than four inches in diameter?

Answer. Not by the company that I know of.

Question. Have the company, to your knowledge, purchased any mains which have been laid since 1887 less than four inches in diameter?

97 (Counsel for complainant objected to that question on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I couldn't answer that, anyhow.

Question. Have any mains been laid in the streets of Walla Walla since 1887 less than four inches in diameter?

(This question was objected — by the counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial.)

Question. By you or to your knowledge?

Answer. Well, I took the contract myself and laid a main; I didn't lay it for the company.

Question. One single main?

Answer. Yes, sir.

Question. Where was that?

Answer. On Craig street.

Question. Was it the length of that main?

Answer. I can't answer that without referring to the book.

Question. About how many blocks long?

(This question was objected — by council for complainant on the ground that it is incompetent, irrelevant, and immaterial and not proper cross-examination.)

Answer. I believe there was a little over one hundred feet of it.

Question. Did you know of others and what size they were?

Answer. It was a two-inch.

Question. Do you know of any other two-inch mains in the city at the present time that have been laid since 1887?

(Same objection as last above.)

Answer. There was one laid on South Second street.

Question. Do you know of any others?

Answer. Not at the present time, I don't think, of any others.

Question. Do you know under whose control those mains are?

Answer. No, sir; I do not.

98 Question. Do you know whether or not the water company sells to consumers water coming through those mains?

Answer. I presume they do.

Question. Do you know whether the water company charges for connections made by consumers with those mains?

Answer. Well, they charge for making connections with the service pipe.

Question. You don't know whether or not those mains form a part of the system of the Walla Walla Water Company?

Answer. They are connected with the system, and I suppose they would form a part of the system.

Question. Let me ask you, at the time this contract was entered into, May, 1887, if there was not about sixteen miles of mains belonging to this system.

Answer. Well, sir, I couldn't answer that.

Question. You can't answer how many miles of mains?

Answer. I don't know how many miles there are now.

Question. Would you be willing to say there is twice the length of mains at the present time that there was in 1887?

Answer. I think there is; yes, sir.

Question. What did you say that the size of the mains on Main street from First to Tenth was?

Answer. From First to Tenth?

Question. Yes, sir.

Answer. Six inches and four inches.

Question. Is not a portion of the mains smaller than that?

Answer. From Tenth? Let's see.

Question. Let me ask you if this isn't a fact, Mr. Bowman, that the Main Street main is six inches from First to Fourth, four inches from Fourth to Eighth, and two inches only from Eighth to Tenth street.

— Well, it is my impression that it is four inches to Tenth street. I know the pipe was taken up and changed on Main street.

Question. You wouldn't want to state positively that that 99 was the fact?

Answer. No; I am very positive, though, for I done that work myself. I might have been mistaken in the number of the street. I am speaking of the street where the steam laundry used to be.

Question. Now, you testified regarding the Poplar Street main, I think. What is the size of the Poplar Street main from First street to Ninth street?

Answer. I think it is a six-inch main.

Question. That is, that the Poplar Street main is a six-inch main?

— No; I was talking about Alder street.

Question. Poplar street?

Answer. It is a two-inch main on Poplar street.

Question. Will the two-inch main adequately supply a fire-hydrant?

Answer. No, sir.

Question. Is Poplar street a thickly populated street?

Answer. Yes, sir.

Question. It runs parallel with Main street only two blocks away?

Answer. Yes, sir.

Question. And there is a distance of eight blocks, isn't there, where that street is supplied with a two-inch main?

Answer. Yes, sir.

Question. That you know to be one of the water company's mains put in by the water company, do you not?

Answer. Yes, sir.

Question. It is still there and in use, isn't it?

Answer. Yes, sir.

Question. Now, I think you testified that the size of the Chase Street main from Birch street to Maple was six inches; is that correct?

Answer. On Chase avenue?

Question. Yes, sir.

100 Answer. It is not correct.

Question. Then what size is it?

Answer. It is six inches near where Mr. Paine lives and four inches from there to Chestnut street.

Question. And from Chestnut to Maple?

Answer. Well, we run by Maple to get to Chestnut.

Question. Are you not mistaken?

Answer. I was thinking about Myrtle street. Maple runs on to Second street.

Question. Now, what is the size of the main from Chestnut street to Maple street?

Answer. From Chestnut to Maple?

Question. Yes, sir.

Answer. Four inches.

Question. Isn't there an inch and a quarter main there on Chase avenue?

Answer. Maple street runs opposite Second.

Question. Doesn't it run from Second to Chase avenue? Now, there is a main between Chestnut street and Maple street on Chase avenue marked on your map. What I want to get at is the size of that portion of the Chase Street main.

Answer. That is an inch and a quarter.

Question. That is a portion of the system of mains belonging to the Walla Walla Water Company, isn't it?

Answer. Yes, sir.

Question. Of what material—that is, what kind of pipe—is the Chase Avenue main?

Answer. It is Kalamime pipe and Matthewson pipe—that is, the four-inch and six-inch.

Question. Four-inch Matthewson and six-inch Kalamime, isn't it?

Answer. Yes, sir.

Question. And an inch and a quarter ordinary gas pipe?

Answer. Yes, sir.

Question. Now, you testified that the Chestnut Street main
101 between Chase street and Singleton avenue is four inches.

Are you correct about that? Now, isn't there a main under the control of the water company extending from Chase street to Singleton's avenue?

Answer. From the corner of Second and Chestnut street running west to near Fourth is a four-inch Matthewson pipe. Off of Chase avenue running east to near Fourth street is a two-inch screwed pipe.

Question. As I understand it, a portion of the Chestnut Street main is a two-inch screwed pipe?

Answer. That was put in by individuals, but the company own it.

Question. It is under the control of the present company and used by the present company, isn't it?

Answer. Yes, sir.

Question. It constitutes a part of their system of mains?

Answer. Yes, sir.

Question. And from which they supply consumers?

Answer. Yes, sir.

Question. Do they supply any fire-hydrants from it?

Answer. No, sir.

Question. Now, what is the size of the main on Pine street between Third and Fourth? Referring to the map to refresh your memory, is there a main on Pine street between Third and Fourth which is under the control of the water company and from which they supply consumers?

Answer. Well, I think there is, but I ain't positive of it.

Question. What is the size of that main—a two-inch?

Answer. It is a two-inch main.

Question. I will ask you if there is a main on Cherry street from Fifth to Second under the control of the water company and from which they supply consumers.

Answer. Yes, sir.

Question. What is the size of that main?

Answer. It is four inches from Second to Fourth and from Fourth to Fifth it is an inch and a half.

102 Question. Let me ask you if that whole main from Second to Fifth is not an inch and a quarter pipe?

Answer. On Cherry street?

Question. On Cherry street, yes, sir, between Second and Fifth, three blocks.

Answer. Well, it is a four-inch main to Fourth from Second, and if I haven't got the street wrong.

Question. Would it be any assistance to you to refer to the map?

Answer. It is a four-inch main from Second to Fourth.

Question. Then you were incorrect. At any event you incorrectly stated the fact that there were no mains belonging to the company which were less than four inches in diameter?

(This question was objected to by counsel for complainant on the ground that the witness did not testify to that effect.)

Question. You say all of those two-inch and inch and a quarter mains and pipes less than four inches in diameter which you have mentioned were laid prior to 1887?

Answer. The majority. One I told you on Craig street. I have not laid any smaller pipes for the company.

Question. They are simply in use by the company?

Answer. Yes, sir.

Question. Do you know whether or not there is on Eighth street running north from Elm a two-inch main that was laid last year?

Answer. Yes, sir; I believe there is.

Question. Now, I will ask you-if there is not an inch and a quarter main on Jackson street between Eighth and Ninth which has been laid since 1887.

Answer. No, sir. I couldn't tell you where Jackson street was.

Question. A very short distance from the northern boundary of the city. Now, here is a main marked here on Rose between Eighth and Ninth street, extending a short distance, about half a block, down Eighth street. Now, what is the size of that main, and when was it laid?

103 Answer. I believe it is an inch and a quarter main.

Question. When was it laid?

Answer. I can't say, but it was laid before this present company took possession.

Question. Are you positive that it was laid prior to 1887; are you positive that it wasn't laid since 1890?

Answer. The pipe I have reference to was run for the benefit of Mr. Bush.

Question. When was the pipe laid to the penitentiary—the first pipe?

Answer. The first pipe, I think, was laid in 1887 or 1888; I am not positive whether it was in 1887 or 1888.

Question. Well, was it laid prior to May, 1887, or since May, 1887—prior or after the making of this contract?

Answer. Since that. I will state, though, that I am wrong in the first statement.

Question. Necessarily this pipe that I refer to must have been laid subsequent to the other penitentiary main; is that right?

Answer. Yes, sir.

Question. Hence the inch and a quarter main must have been laid since the making of that contract?

Answer. Yes, sir.

Question. That is right, is it?

Answer. Yes, sir.

Question. Did you testify that there is a main on Madison?

Answer. Yes; a four-inch main.

Question. Between what streets?

Answer. Between Dr. Newell and Whitman. I don't know whether it is called Whitman or Bryant's avenue.

Question. That would be a distance of one block?

Answer. Yes, sir.

Question. The Pine Street main is an inch and a quarter main, isn't it?

104 Answer. No, sir; it is a two-inch main.

Question. Was that laid prior to the making of this contract or after the contract was made?

Answer. Well, I can't answer that positively.

Question. On Rose street isn't there an inch and a quarter main between Fourth and Sixth street, a distance of two blocks?

Answer. Yes, sir.

Question. And when was that laid?

Answer. I couldn't say positively when it was laid.

Question. Well, was it laid before or after the making of that contract?

Answer. I think it was laid before. It has been laid for some time, I know.

Question. You are not positive about that?

Answer. No, sir; I am not.

Question. Now, you spoke of the ditch from the South reservoir to Alder street. That ditch is the connection between the South reservoir and the Alder Street main, isn't it—the Alder Street twenty-inch main?

Answer. Yes, sir.

Question. Is it an open or closed ditch?

Answer. Closed.

Question. Is it a ditch or box or flume?

Answer. The ditch was dug and flumed up and closed.

Question. Why is that used instead of a pipe, Mr. Bowman?

Answer. I can't answer why.

Question. Could — state about how many miles of main two inches and less there are now in the city of Walla Walla?

Answer. No, sir.

Question. Would it exceed two miles?

Answer. I think it would; yes.

Question. Would it exceed three miles?

Answer. Do you mean two inches and less?

Question. Two inches and less; yes, sir.

105 (This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant and immaterial, and not proper cross-examination.)

Answer. I couldn't answer that at all. I wouldn't think there was over two miles altogether.

Question. Mr. Bowman, has the water company a main running from some point on Main street to the works of Dement Brothers?

Answer. From a point on Main street?

Question. Or Alder street either.

Answer. I don't know of them having any there.

Question. Is there a main to or towards Dement Brothers' works?

Answer. Yes, sir.

Question. To what point does that run and along what street?

Answer. I couldn't tell all the streets. It starts from Rose street near Ninth.

Question. And what is the size of that main?

Answer. It is a two-inch main.

Question. And when was it laid?

Answer. I think it was laid about a year ago, if I am not mistaken.

Question. That main is used by consumers other than Dement Brothers, is it?

Answer. I couldn't answer that question positively. There are two or three consumers on it, but whether Dement Brothers control the whole thing I don't know.

Question. Are you in the employ of the water company, Mr. Bowman?

Answer. No, sir.

Question. You are simply a contractor?

Answer. They simply hire me by the day, when they have any work to do; that is all.

Question. This morning you stated that you thought the amount of two-inch mains and two-inch pipe which is now laid in the city and owned by the water company did not exceed two miles. Let

me ask you if there is not upwards of thirty-three thousand 106 feet of pipe in use in two-inch mains, or something over six miles.

Answer. No, sir; I couldn't say.

Question. And what portion of that two-inch pipe was laid before the making of the contract and what portion was laid after, if you are able to state definitely?

Answer. I couldn't answer that definitely; no, sir.

Question. Could you get a section or a small piece of Matthewson pipe and of Kalamime pipe and bring them here for measurement?

Answer. Yes, sir.

Question. Would you kindly do so at your convenience?

Answer. Yes, sir.

Question. Now, I will ask you if there is not a main on Pine street, running from Sixth to Seventh, then a short distance south on Pine street, probably about one hundred and twenty feet, of inch and a quarter pipe laid since the making of the contract.

Answer. On Pine, I think, between Tenth and Eleventh.

Question. Seventh street?

Answer. It may be; it seems further down than that. I run that pipe myself on a contract from them. It is a two-inch pipe.

Question. Now, whose permission did you get to lay this?

Answer. I got permission from the water company.

Question. And these pipes were laid in the public street?

Answer. Yes, sir.

Redirect examination:

Question. I want to ask the witness a few questions that may properly not come within the redirect examination. How far from the boundary line of the street, Mr. Bowman, were those mains laid?

Answer. Twenty-five feet.

Question. Were any of them laid more than twenty-five feet from the boundary?

Answer. I don't think there is. Well, I will give you one case

where I had to attach on Third street; there was a T. I run in to the twenty-five-foot line as soon as I could.

Question. Where the street turned?

107 Answer. No; I made the turn in the ditch in order to get back in the proper place. I didn't want to cut the pipe and put in a T. I used the T that was in.

Question. From the boundary line?

Answer. Yes.

Question. How many rods did you say that pipe was in length?

Answer. I don't know; over two or three rods of it. I run back in the right place.

Question. How deep were those pipes laid?

Answer. From three to three and a half feet deep.

Question. Describe the surface of the ground above where the pipe has been laid on those different streets, whether it — smooth or rough.

Answer. A portion of it is smooth and some of it is rough where the street is not graded. They were laid to grade.

Question. How was the ground that was removed by the digging of the ditches put back in?

Answer. It was put back in the trench and tamped with a heavy tamper.

Question. So that it was well and firmly packed down?

Answer. Yes, sir; any roughness was taken off.

Question. Was that the case with all the mains or pipes?

Answer. When they were laid on a graded street, invariably; yes.

Question. And where it was not graded what was done?

Answer. It was put back in as good shape as possible. It was always pounded down on a piece of ground where the street wasn't used.

Question. State whether or not the mains on the north and south side of Mill creek are connected directly with the reservoir and with the stand pipes.

Answer. Yes, sir; both of them.

(Witness excused.)

(Signed)

F. M. BOWMAN.

108 Dr. Y. C. BLALOCK, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. State your name and residence.

Answer. Y. C. Blalock; Walla Walla.

Question. What is your business and occupation?

Answer. Physician.

Question. What other business have you, or occupation?

Answer. I am chief of the fire department.

Question. For how long have you held that position?

Answer. For three years and nine months.

Question. Are you familiar with all the fire-hydrants in the city of Walla Walla?

Answer. I think so.

Question. How many fires have there been in the city of Walla Walla since you were chief of the fire department, to the best of your recollection?

Answer. I can't give you the amount or number of fires; the records are in charge of the secretary of the department, who is absent from the city; the only record I have is from the first of 1893; there were twenty-five alarms and seventeen fires during 1893.

Question. Was that fair average of the fires during the preceding time?

Answer. I think it was a fair average; during one year we had more than that.

Question. How many of those fires have you attended as chief of the fire department?

Answer. I think I attended all of them during 1893; I am not positive, but I think I did.

Question. During the four years or three years and nine months that you have been chief how many fires have you attended?

Answer. Almost all of them, with a few exceptions, when I was absent from the city.

109 Question. Have you had charge of the firemen and had general control of the putting out of those fires?

Answer. Yes, sir.

Question. And have had occasion to examine the pressure from the fire-hydrants during these fires?

Answer. I examined the pressure during the fires particularly and especially on the engine; as we were using it I examined that occasionally.

Question. Was or was not the pressure supplied by the fire-hydrants sufficient for fire purposes?

Answer. Yes.

Question. Have you ever had any occasion to complain of a lack of pressure or water supply from any of those hydrants during any of those fires?

Answer. No, sir.

Question. Have you ever made any complaint to the city or to the water company?

Answer. No, sir.

Cross-examination:

Question. Dr., you use for extinguishing fires the ordinary steam fire-engine?

Answer. Yes, sir.

Question. There are two of them in the city?

Answer. Yes, sir.

Question. How many streams do either of those engines throw?

Answer. Ordinarily two.

Question. Have there been any fires that you have been unable to attach the second stream when so desired?

Answer. No, sir.

Question. Have you had any fires on Main street?

Answer. Yes, sir.

Question. Do you know the size of the main on Main street?

Answer. I do not; I think it is six inches; that is only
110 hearsay, though; I am not positive.

Question. Now, have your engines, at any of those fires when you attempted to put on the second stream, failed to throw water with sufficient force?

Answer. No, sir.

Question. Do your engines ever suck air?

Answer. From some parts of the town they suck air.

Question. Do you consider that where the engines suck air you have sufficient pressure for fire purposes?

Answer. Yes, sir; I will qualify that this way: For ordinary outlying districts we don't want but one line of hose. A four-inch main where the pressure is heavy will supply it; where the pressure is light it will not.

Question. Is it not a fact that a four-inch main which is conveying water from some distance does not furnish, with the amount of pressure that you have on the mains here, a sufficient amount of water to enable the engines to throw two streams?

Answer. Well, it would be owing to where you set and the pressure you have.

Question. Is not that the case in many parts of this town?

Answer. I don't think so.

Question. Is it the case in some parts of the town?

Answer. It is.

Question. In what parts of the town?

Answer. In the upper portion, perhaps, and in the southwestern and northwestern portions of the city, and especially when they are using considerable water for irrigation purposes.

Question. You are familiar with the location of the hydrants, I presume?

Answer. I think so.

Question. There is a hydrant at the corner of Madison and Whitman streets?

Answer. Yes, sir.

Question. Are there valuable residences there or not?

Answer. I think so; yes, sir.

111 Question. Do you think an engine could get two streams from that hydrant—sufficient water for two streams?

Answer. I think so. It is owing to the condition of the water for irrigation purposes.

Question. You mean it would depend on whether water was being used for irrigation purposes or not, and if not used for irrigation you could get sufficient water for two streams?

Answer. Yes, sir.

Question. About what pressure do you think there was at that hydrant?

Answer. At Madison and Whitman?

Question. Yes.

Answer. Not more than ten pounds, perhaps.

Question. Do you know what firemen and men who have made a study of that subject consider a sufficient pressure to enable an engine to work satisfactorily from a four-inch main?

Answer. No, sir.

Question. Do you know that it is about seventy-five pounds?

Answer. No, sir; I do not.

Question. Well, Dr., if you don't know what pressure is sufficient, why do you say that the pressure here in Walla Walla is sufficient?

Answer. I have found it so, sir, from actual use.

Question. Although your engines have at times sucked air with two streams?

Answer. They have when I had no nozzle on the end of the hose.

Question. You don't pretend to say that you use a hose without a nozzle on it?

Answer. It has been used so for testing an outlying hydrant.

Question. Have there been any fires during your experience as chief when you thought it necessary to attach the second line of hose to the engine and your engines have failed to get water enough to supply both lines and have sucked air?

112 Answer. No, sir.

Question. Not once?

Answer. No, sir.

Question. That has never occurred during your experience as chief?

Answer. No, sir; not when I was present.

Question. You have been present at all of the fires?

Answer. At most of them; not at all of them.

Question. Now, suppose there was no pressure at all at the hydrant, do you think you would have sufficient pressure to use your engine to throw water out of the main?

Answer. That I have had no experience in, sir.

Question. Do your engineers and other subordinates make reports to you?

Answer. Yes, sir.

Question. Written or verbal?

Answer. Generally verbal lately.

Question. Do you know the hydrant at Grove and Washington street?

Answer. Yes, sir.

Question. Is that part of the town well populated and needs fire protection?

Answer. Yes, sir.

Question. About what water pressure is there there?

Answer. I don't know. I wasn't present with the engine when the pressure was taken up there and never was out there during a fire.

Question. How about Palouse and Birch ; about what pressure have they there ?

Answer. I couldn't tell you ; I don't think, though, over fifteen or eighteen pounds—fifteen, I think, perhaps. As I say, I wasn't present when that hydrant was tested.

Question. At what hydrants were you present during the testing ?

113 Answer. I was present during most of them. I was present when they put them in, the majority of them ; not all.

Question. I think you said, Dr., that in your opinion in those outlying districts you would not be able to get four streams from four-inch mains ?

Answer. Not when using the water for irrigation purposes, but they generally shut off the water for irrigation when there is a fire.

Question. Your fire-alarms are general ?

Answer. General alarms.

Redirect examination :

Question. Dr., have these fires which you have spoken of taken place all over the city ?

Answer. Yes, sir.

Question. You are an elective officer, are you not ?

Answer. Yes, sir.

Recross-examination :

Question. By whom ?

Answer. By the volunteer fire department, and ratified by the city council.

(Witness excused.)

(Signed)

Y. C. BLALOCK.

B. B. OPPENHEIMER, being first duly sworn as a witness on the part of complainant, testified as follows :

Question. Where do you reside, Mr. Oppenheimer ?

Answer. In Portland.

Question. Do you do business in Walla Walla ?

Answer. I do.

Question. Have you done so for some time ?

Answer. I have.

Question. Yourself ?

Answer. I have done business here myself for the last three years.

Question. What business are you engaged in ?

114 Answer. Selling goods.

Question. Have you ever sold material to the Walla Walla Water Company ?

Answer. Yes, sir ; this year, last year, and year before last.

Question. What material ?

Answer. Matthewson water pipes and gates and valves.

Question. How much, about, have you sold to the Walla Walla Water Company during that time?

Answer. In the neighborhood of six or seven thousand feet, I guess.

Question. During what year have you sold most of this material?

Answer. Well, I guess the last three years what I have sold. Some had been sold to them before I sold it, through the house.

Question. That was all the same material?

Answer. It was Matthewson No. 2 pipe.

Question. And the same quality?

Answer. It was the same quality.

Question. For what purpose did you sell this material?

Answer. For water mains.

Question. Is this pipe constructed for this purpose?

Answer. It is.

Question. Have you sold a considerable amount or any quantity of this pipe to different cities for water mains?

Answer. Yes; seventy-five or eighty thousand dollars' worth in this section of the country.

Question. Do you know what pressure this pipe is able to stand?

Answer. Yes, sir.

Question. What pressure?

Answer. Three hundred pounds to the square inch; guaranteed to do that.

Question. Do you know what pressure this pipe has withstood in different places or any places where used for water mains?

Answer. At Lewiston it stands a pressure of ninety-eight
115 pounds to the square inch at the present time.

Question. In any other city do you know the pressure?

Answer. Yes; Waitsburg and Dayton. I believe Dayton has eighty-five pounds to the square inch.

Question. In all the places that you know of does it withstand a pressure of more than fifty pounds to the square inch?

Answer. Oh, yes.

Question. By whom is this pipe manufactured?

Answer. It is manufactured by the American Tube and Iron Company.

Question. Do you know anything about Kalamime pipe?

Answer. I know a little about it.

Question. Do you know whether that pipe is able to withstand the pressure?

Answer. Yes, sir; I believe it is.

Question. Do you know as a matter of fact whether or not the Kalamime pipe is generally accepted by the Pacific Insurance Union as the standard pipe for purposes of mains?

Answer. I don't know anything about the insurance companies. I know it is accepted all over the country as a standard pipe.

Cross-examination:

Question. The pipe you have sold to the Walla Walla Water Company has all been Matthewson No. 2, has it?

Answer. Some of it might have been No. 1. When anything was wanted it was shipped right from Portland. Some might have been No. 1.

— They were four-inch pipes?

Answer. Four-inch, six-inch, and eight-inch.

Question. The pipe you sold?

Answer. I have sold four-inch and I have sold six-inch.

Question. To this Walla Walla Water Company?

Answer. Yes, sir.

Question. Now, is that four-inch pipe internal or external
116 measurement?

Answer. Internal.

Question. Isn't the Matthewson four-inch pipe four inches external measurement?

Answer. I can't answer that; it is sold for four-inch pipe all over the country.

Question. You are in the mercantile and not the mechanical portion of this business?

Answer. I am not in the mechanical part; no, sir.

(Witness excused.)

(Signed)

B. B. OPPENHEIMER.

W. P. WINANS, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. How long have you been a resident of Walla Walla, Mr. Winans, approximately?

Answer. About thirty years, I think.

Question. What is your business at the present time?

Answer. My business now is president of the Farmers' savings bank.

Question. Are you a stockholder in the Walla Walla Water Company?

Answer. I am not.

Question. Have you any interest in it?

Answer. No, sir.

Question. Were you at any time a stockholder in the Walla Walla Water Company?

Answer. Yes, sir.

Question. During what years?

Answer. I was a stockholder from, I think, about 1885 to 1891.

Question. Were you ever a director of the Walla Walla Water Company?

Answer. Yes, sir.

Question. During what years?

117 Answer. I was director or trustee, I think, from some time in 1887 to 1891.

Question. Were you ever an officer in the company outside of trustee?

Answer. Yes, sir.

Question. What other position did you hold?

Answer. I was its secretary.

Question. During what years?

Answer. From the spring of 1889 to the summer of 1891.

Question. As such trustee and secretary, were you generally familiar with the affairs and condition of the water company during the periods that you were secretary and trustee?

Answer. I tried to be; I made it my business.

Question. As secretary of the company, did you have a ledger in posting from the books in your possession as secretary?

Answer. Yes, sir.

Question. Was the ledger posted under your directions and supervision?

Answer. Yes, sir.

Question. During what years?

Answer. During the years from 1889 to 1891, a little over two years.

Question. Do you remember the fact of a contract being entered into between the city of Walla Walla and the Walla Walla Water Company for supplying the city of Walla Walla and its inhabitants with water in May, 1887?

Answer. Yes, sir.

Question. Prior to that date can you give us some idea of the plant, mains, pipes, and other material owned by the Walla Walla Water Company? In the first place, how many reservoirs were owned by that company, do you know?

Answer. I think there were two.

Question. And where was the water supply?

118 Answer. The water was supplied by one reservoir north of the creek on Isaac's ground, and one south of the creek by the race-track.

Question. Was that owned there in 1887?

Answer. I don't know. It was when I was secretary.

Question. You don't know with reference to the present time?

Answer. In May, 1887, when I was a stockholder.

Question. Do you know whether at the time and prior to the time when this contract was made the city of Walla Walla was sufficiently supplied with water or not?

Answer. There was a supply along in the central part of the town, but it was a limited supply.

Question. Was there any general discontent expressed of the existing supply of water at that time by the people of the city?

(This question was objected to by counsel for defendant-on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. Well, judging from the complaint at the office, I should say there was considerable.

Question. Did you know anything about public meetings having been held at that time and shortly before the contract was made?

Answer. I don't recollect about it.

Question. Can you give us some idea of the different sections of the city that were not supplied at that time by a description of the additions of the town?

Answer. Well, this part over in the Third ward had a little or no supply, and up above Park street, in the First ward, in the neighborhood of Chase street, and lower Fourth ward was not supplied.

Question. I wish you would examine the map and tell us any other portions of the city that were not then supplied with water.

Answer. That is all. There are only four wards in the city, and that takes them all.

Question. In all these wards, then, there was no water supply?

119 Answer. There was a very little, except close around on Main street.

Question. During the time that you were secretary and trustee of the company, were or were not extensive improvements and extensions of the company's plant made by the company?

Answer. Yes, sir.

Question. Of what did those extensions consist?

Answer. They brought a large main down Boyer's avenue from the reservoir north of the creek, consisting of four or five thousand feet of pipe, starting with a twelve-inch pipe and extending a little ways across Main street, only a short distance in that direction.

Question. Do you mean extending into Cain's addition?

Answer. Yes, sir.

Question. In what part of the city did you live at that time, Mr. Winans?

Answer. In the First ward, on First street.

Question. How was the water supply in that district of the city?

Answer. Well, I didn't have any.

Question. Did the other people in your neighborhood have any, or were you an exception?

Answer. Well, I think there was some at the brewery—it is on Second street—but myself and some of my neighbors formed a water company ourselves.

Question. Because of the insufficiency of the water supply?

Answer. Yes, sir.

Question. Can you describe generally the condition of the books prior to the time that you were secretary, as to whether they were kept very clearly?

Answer. I think the entries were all made, possibly, of the dollars and cents, but it wasn't kept in an orderly manner. A book-keeper could take it and seggregate it and make it intelligible.

120 Question. But other people would have difficulty in finding out the condition of the affairs of the company?

Answer. That is according to his capacity. Every man to his profession. I don't know. I couldn't pass on that.

Question. Can you give an approximate estimate of the amount

of money that was expended by the water company in improvements during the time you were secretary and trustee, from your knowledge and recollection of the books, and also from your general knowledge and memory?

Answer. From my recollection and from what I gather from the books, it was estimated that there had been expended by the company something like forty-five thousand dollars up to 1889 or 1890. I wouldn't be certain about the dates.

Question. During the time that you were secretary of the company?

Answer. Yes; while I was secretary. I think I was secretary a year or so after that, because for the first few months that I was secretary I spent some time examining the books finding out what had been done.

Question. In the year 1890 or 1891 did you make an estimate of the value of the plant, improvements, and property of the Walla Walla Water Company?

Answer. I don't recollect. I made an estimate in 1889 or 1890.

Question. Do you know what that estimate was and whether it was correct, to the best of your then knowledge?

Answer. My estimate, I think, of the plant was one hundred and fifty thousand dollars, besides the debts that were against it; that is my recollection.

Question. You think that estimate was of the property owned by the company?

Answer. Yes; of the property owned by the company, its water rights, and things that would add to its value, and on the basis of that estimate I based the value of the stock.

121 Question. When did you purchase your stock, Mr. Winans?

Answer. I purchased my stock at first, I think, some time about 1881 or 1882; something like that.

Question. When was the last purchase you made?

Answer. In 1887, I think.

Question. Before or after the contract was made with the city?

Answer. That I don't recollect.

Question. Was this what is called the infiltration chamber built during the time that you were secretary?

Answer. The what?

Question. The infiltration chamber—the company's big ditch that is connected with the Alder Street main and stand pipes.

Answer. No. That Alder Street main was put in in 1892. I was in Europe that year.

Cross-examination:

Question. In making your estimate of the value of this property, Mr. Winans, did you consider anything besides the cost of the property that the water company held in its plant?

Answer. Yes, sir.

Question. This estimate was made for the purpose of getting at the value of the stock, was it not?

Answer. The estimate was made for the purpose of ascertaining what our stock was worth.

Question. To ascertain the value of the stock?

Answer. Yes, sir.

Question. As to what one who wanted to sell should receive for it at that time?

Answer. That is the idea, sir.

Question. Now, didn't you take into consideration rather the income capacity of the plant rather than the cost of it?

Answer. No, sir; the whole surroundings—the income capacity and the cost of it, both.

Question. Do you recollect what you estimated the cost to be?

Answer. I know what my stock cost me.

122 Question. I don't mean the cost of the stock, but the cost of the plant.

Answer. No, sir.

Question. You don't know that?

Answer. No, sir.

Question. Do you recollect what income it paid?

Answer. Taking the whole time together that I had my stock, I don't think the income would have been more than five per cent. on the money invested.

Question. Five per cent. per annum?

Answer. Yes, sir.

Question. At the time you made the estimate wasn't it producing considerable more income than that?

Answer. Yes, sir.

Question. It was with reference to that time that you made your estimate?

Answer. Yes, sir.

Question. Then your estimate at that time was that it would produce a reasonable income on two hundred and fifty thousand dollars?

Answer. It wasn't producing that income at that time. I would like to suggest that it was the expectation that it would produce that in the near future.

Question. On what amount?

Answer. On two hundred and fifty thousand dollars.

Question. Now, in estimating the value of this stock, I suppose you took into consideration the franchise?

Answer. I don't recollect about that.

Question. You took into consideration this contract with the city?

Answer. That would be a consideration, as that was paying fifteen hundred dollars a year. Of course, that was something tangible.

123 Question. You took into consideration what you considered the exclusive character of this contract with the city?

Answer. No, sir; because I didn't consider it so.

Question. You didn't consider that the city was debarred from itself erecting water works?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial, and that it is not proper cross-examination.)

Answer. I did not.

Question. And that entered into the value of this stock?

Answer. As far as I was concerned, I considered nothing more than fifteen hundred dollars a year. I have had too much experience with that thing.

Question. I will ask you were you secretary of the company at the time an effort was made to sell the property to the city?

Answer. I don't recollect.

Question. Are you cognizant of that effort being made?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I don't recollect.

Question. Do you know that an effort was made to sell all the property to the city for two hundred thousand dollars?

(Same objection as last above.)

Answer. I answered that question twice before. I don't recollect anything about it.

Question. That is your answer, that you don't recollect anything about it?

Answer. I don't recollect anything about it. Matters that came to my knowledge I recollect.

Question. You say that in 1887 there was general discontent with the water supply, and that complaints were being made to the company?

Answer. Judging from complaints that were being made
124 at the office I stated.

Question. Were complaints rare between 1887 and 1891?

Answer. They were much rarer the last year I was secretary than the first year.

Question. Was your water supply better in 1891 than in 1889?

Answer. Yes, sir.

Question. Do you know whether or not there is a general discontent with the supply at the present time?

(This question was objected to by counsel for complainant on the ground that it is incompetent.)

Answer. No; I don't know. I know that during some political canvasses here they used that as a political dodge to run their own men in office.

Question. And to put men out of office?

Answer. Yes, sir.

Question. So you think the water election was held to put some men out of office?

Answer. That is a mere matter of opinion; I think it was.

Question. You think where the issue was solely whether or not the city should put in water works it put in some men in office?

Answer. Yes, sir; those favorable to it.

Question. Do you think the people generally, then, are dissatisfied with this present system and want a system owned by the city?

(Counsel for complainant made same objection to this question as above, that it is incompetent.)

Answer. I think if it was left to the tax-payers who pay taxes on real estate this city would vote just the opposite direction that they did when they voted.

Question. Don't people who don't pay taxes have as much water as those who do?

(Counsel for complainant objected to this question on the same ground as last above.)

(Question not answered.)

125 Question. The non-tax-payers of Walla Walla use water, do they not?

Answer. I expect they do.

Question. I understand you to say that between 1887 and 1889 you were not familiar with the expenditures of the company, except from your knowledge gained from examining the books of the company kept at that time; is that right?

Answer. That is right, sir.

Question. From 1889 to 1891 you were secretary of the company and had charge of its books?

Answer. From some time in the spring of 1889 to the summer of 1891, about two years.

(Witness excused.)

(Signed)

W. P. WINANS.

HARRY H. TURNER, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. Your residence is Walla Walla, Mr. Turner?

Answer. It is.

Question. What is your present occupation?

Answer. I am secretary of the Walla Walla Water Company.

Question. How long have you held that position?

Answer. Since the first day of September, 1891.

Question. Who did you succeed?

Answer. Mr. W. P. Winans.

Question. What are your duties in general as secretary of the company—what have they been since the date that you took your position?

Answer. I have entire charge of the books of the company, look after their collections, bank accounts, and general clerical work.

Question. Have you examined the books of this company and are you familiar with those books and the expenditures that have been placed since the time you became secretary?

Answer. I am.

126 Question. Are you sufficiently familiar with those books to testify as to what they contain regarding the expenditures made by the water company in connection with the extension of its plant from May, 1887, to the present time, and especially 1892?

Answer. I am generally familiar. It is rather hard to go very much into details without the books themselves. I am as familiar as the average book-keeper is with the books he keeps.

Question. You have made an especial examination with reference to this case?

Answer. I have; yes, sir.

Question. You heard Mr. Winans' testimony?

Answer. I did.

Question. You heard him speak of the ledger being posted under his supervision?

Answer. I did.

Question. In 1890 or 1891?

Answer. The ledger was first posted up in 1889. Since that time it has been kept up from time to time.

Question. Have you had charge of keeping up the ledger since the time that you became secretary?

Answer. I have.

Question. Are you familiar with the contents of the ledger with reference to the expenditures and improvements that have been made by the water company between those dates already mentioned?

Answer. I am.

Question. Do you know whether all your books from which the ledger was posted under Mr. Winans' directions are still in the possession of the company?

Answer. They are not.

Question. From an examination of the ledger are you — to say what expenditures were made in the year 1887 and before the date of this contract, in May, 1887?

(This question was objected to by counsel for defendant- on
127 the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I can by referring to some memoranda I made.

Question. When was that memoranda made—at the time you familiarized yourself with the books?

Answer. At that time; yes, sir.

Question. At what time was this memoranda made?

Answer. During the last week.

Question. Well, state the amount of those expenditures.

(This question was objected to by counsel for defendant- on the ground that it is incompetent, irrelevant and immaterial, and not the best evidence; also objected to the use of the memoranda.)

Answer. I can't state without memoranda.

Question. Do you know that this memoranda that you have taken correctly represents the statements found upon the books?

Answer. They do.

Question. Have you the ledger with you?

Answer. I have.

Question. State from the ledger the different expenditures that have been made from May 9th, 1887, to the present time.

(This question was objected to by counsel for defendant on the ground that it is incompetent, irrelevant and immaterial, and not the best evidence.)

Answer. The ledger account, under head of water works, plants, and improvements, shows a total expenditure from the writing up of this ledger until December, 1891, of \$88,484.62.

Question. Under what headings were those items charged?

Answer. Labor, material, notes and bonds, freight and hauling, labor and material, freight and hauling, construction and material. The segregated items were found under the heads of those titles.

Question. Can you segregate those items and let us know the expenditures that have been made on freight, labor, and materials?

Answer. I put it down, so I would have it here, on a memorandum.

128 Question. You have already made the footings, have you?

Answer. That is done on this memorandum.

Question. You can make use of that memorandum for that purpose.

(COUNSEL FOR DEFENDANT:- I would like to have it understood that this is all subject to my objection.)

Answer. Freight, \$2,452.20; labor, \$1,672.93; material, \$5,158.94.

Question. That was during the year 1887, you say?

Answer. Yes, sir.

Question. From the date of the contract?

Answer. From the date of the contract, except some of the entries under labor were prior to the making of the contract. In 1888, freight, \$1,534.01; labor, \$2,344.88; material, \$4,903.03. In 1889, freight, \$333.52; labor, \$1,313.38; material, \$1,004.12. In 1890, freight, \$1,024.13; labor, \$2,987.88; material, \$7,155.69. In 1891, freight, \$967.45; labor, \$2,201.20; material, \$4,388.06. On the first day of January, 1892, I reopened these books. They had formerly been kept on a single-entry basis. All the items throughout the plant account had been carried direct into the labor account instead of separating the accounts of labor, freight, and material. I have subsequently segregated the items since the first of January, 1892.

Question. As to the expenditures of which you were testifying since the time that you became secretary, have you or not personal knowledge?

Answer. I have personal knowledge now.

Question. How did you obtain this knowledge?

Answer. All those disbursements were made by me personally.

Question. By check?

Answer. Generally by check or cash.

Question. From the first day of January, 1892, you say?

Answer. Yes.

— From that up to the present time you are testifying from your own personal knowledge?

129 Answer. Yes, sir. The expenditures in 1892 were \$10,777.97; in 1893, \$4,487.87; in 1894, \$453.44. There are some additional items here not shown under the headings of freight, labor, and material that I will specify.

Question. Of what do those items consist?

Answer. In 1889, purchase of real estate surrounding reservoir, \$4,000.00; during the winter of 1893-'4, purchase of water rights, \$10,000.00; in 1890, purchase of the plant of the company referred to by Mr. Winans, known as the city water works, \$3,000.00. Then follows one-half of the salary paid the superintendent of the company in 1887, \$280; in 1888, \$480; in 1889, \$500; in 1890, \$510; in 1891, \$510; in 1892, \$600; in 1893, \$600. Then at or about the time of the making of this contract, from my own personal knowledge, of course—I can't say definitely—for the purchase of real estate for protecting the supply of water, amounting to \$12,000.

Question. Of what did the duties of the superintendent principally consist?

Answer. His main duty was the care of the water system, superintending making extensions and work of that character. He was the practical man of the company.

Question. Now, as to the expenditures you have testified to from your examination between the last of May, 1887, and the date when you took charge of the office as secretary, does the ledger contain a record of all those charges—this ledger that you are using now?

Answer. It contains a record of the dates, and in dollars and cents all the amounts of the expenditures for freight, labor, and material; yes, sir.

(COUNSEL FOR COMPLAINANT: I will then offer this ledger in evidence and ask that it be marked Complainant's Exhibit "E.")

(COUNSEL FOR DEFENDANT: I will consent that an examined copy of those entries may be substituted for the ledger itself; but, however, I am not admitting that it is competent evidence.)

130 Question. Now, Mr. Turner, with reference to the rates of the water company, has the water company always maintained the same rates?

Answer. During the time that I was secretary there have been two reductions made in the rates.

Question. Have you a schedule of the rates of the company as they existed when you first became secretary?

Answer. I have not it with me; it is at the office.

Question. Have you any schedule of the present rates with you or is it in the office?

Answer. It is in the office. I can tell, though, what they are—the general rates.

Question. Will you give the schedule water rates of the year 1890 and 1891?

Answer. This book that I have here is the printed rules and regulations and water rates of the Walla Walla Water Company to buyers before 1890—monthly water rates. No rates less than \$1.50. Bakers, no rates less than \$2.00.

Question. Is that per month?

Answer. Monthly water rates.—Barber shops: First chair, in addition to water-closets and baths, \$1.50; each additional chair, 25 cts. Bath-tubs: First tub, private, 50 cts.; each additional tub, 25 cts; first tub in hotel, boarding-house, and barber shops, \$1.50; each additional tub, \$1.00. Blacksmith shops: One fire, in addition to water-closets, \$1.50; each additional closet or fire, 50 cts. Brewery, in addition to engine, fifteen dollars and upwards. For building purposes: Wetting each one thousand brick, 20 cts.; wetting each barrel of lime or cement, 15 cts.; stone-work per perch, 10 cts. Butcher shops and fish markets, in addition to water-closets, \$3.00. Chinese wash-houses, \$7.00 to \$10.00. County buildings, contract rates or by the meter. City buildings, etc., contract rates. Family rates, in addition to water-closets, bath and hose, if any, \$1.50. Fountains: With $\frac{1}{8}$ nozzle, 50 cts.; with $\frac{1}{4}$ nozzle, \$2.00. Gas company, special rate or by the meter. Hotels and boarding-houses, 131 in addition to water-closets, baths and urinals, and first faucet, rates per room, 20 cts. Ice cream or soda fountain, in addition to water-closets, \$2.00. Laundries, ordinary supply rate or by the meter. Steam-engine, special rate or by the meter. Lawns, see fountains. Manufacturies and shops, in addition to water-closets: Six persons or less, \$1.50; each additional person, employ  s, 10 cts. Meter rates: From one to twenty-five thousand gallons per month, per thousand, 30 cts.; over twenty-five thousand up to fifty thousand, 25 cts.; over fifty thousand to one hundred thousand gallons, 20 cts.; all over one hundred thousand, 16 cts. Offices, each, in addition to water-closet, \$1.00. Photograph galleries, in addition to water-closet, four to seven dollars. Printing offices: Each power press, in addition to water-closet and steam-engine, \$3.00; each hand press, \$1.00. Public buildings and blocks, per room, in addition to water-closet, urinals, and faucets, 20 cts. Restaurants and coffee-houses, in addition to water-closet, \$5.00. Saloons, in addition to water-closet and cooler, \$3.00. Schools, public or private, special rates. Stables: First stall, with one or two horses, \$1.00; each additional stall to ten, 50 cts.; each additional stall over ten up, 25 cts. Stores: Drug stores, in addition to water-closet and urinals, \$3.00 to \$5.00; grocery stores, in addition to water-closet and urinals, \$1.50; dry goods and other stores, in addition to water-closet and urinals, \$1.50. Urinals: Properly constructed, 50 cts.; constant flow, \$1.00. Water troughs for stock, \$1.50 to \$3.00. Water-closets: First closet, private, 75 cts.; each additional, 25 cts.; first closet in stores, \$1.00; first closet in hotels, boarding-houses, saloons, public buildings, and blocks, \$2.00; each additional, \$1.00. Irrigation of lawns, yearly rates only. Rates for the year beginning May first: For five months, 800 square yards or less, 50 cts. per hundred yards; for all over 800 square yards, per 100 yards, 25 cts. No irrigation less than one dollar per month.

For convenience the yearly rate will be divided into five payments, one to be made on the first days of May, June, July, August, and September. Coolers, by meter only.

132 Question. When were those rates reduced?

Answer. I think in the spring of 1892 the rate for irrigation of lawns was changed, so that on the second charge for all over 800 square yards it was changed from 25 cts. per 100 square yards to ten cents.

Question. What other change?

Answer. The family rates were changed from \$1.50 to \$1.00, which took effect the first of July, 1893. Those are the only specific changes. The rates are not stated correctly in this schedule, however. The company is using them simply to avoid the expense of reprinting them.

Question. Is the practice uniform where there are changes made?

Answer. Yes, sir; all in the same line of business are treated alike.

Question. You had better give all the changes.

Answer. I believe there are no other changes. I would say, though, as regards the rate for blacksmith shops the rate is \$1.50 for the first fire and 50 cts. for each additional fire. As a matter of fact, there is only — blacksmith shop in town that the charges are more than \$1.50 for, and all of them have more than one fire. In the schedule the rate charged fish markets is \$3.00. As a matter of fact, no fish market is charged more than \$1.50. The rate for Chinese wash-houses is given at from seven to ten dollars. Eight dollars is the largest amount charged any wash-house. Those not having water-closets are charged seven dollars. That is about the minimum charge. Ice cream and soda fountains: There are several soda fountains in town, for instance, in the drug stores, and no extra charge is made for them. Manufacturies and shops: The rate for six persons or less is \$1.50; each additional person, 10 cts. That is not followed at all. We charge \$1.50 for manufacturies and shops without reference to the number of people. The office

133 rate specified would be one dollar in addition to water-closet. These buildings on Main street, where these offices are located, we charge simply 20 cts. a room, and on the ground floor, for stores, we charge \$1.50. Photographers: The first rate was \$4.00, and from that up to \$7.00. The highest rate charged in town is \$3.50, and there is only one at that price. Printing offices: The rate according to this schedule is \$3.00 for each power press besides water-closet and steam-engine and one dollar for each hand press. The rates are very much less than that. I haven't in mind now the prices, but the rates charged now are very much less than given in this book. Restaurants and coffee-houses: In addition to water-closet the rate as given here is \$5.00. As a matter of fact, \$5.00 is the largest rate charged, and that for the largest restaurant in town and where they have a water-closet; and for coffee-houses the highest rate charged any one is two dollars a month. The original rate charged for urinals, when properly constructed, was 50 cts.; for constant flow, one dollar. Outside of a dozen, I should think, every

urinal in this town is a constant-flow urinal; the water runs twenty-four hours a day. The rate now charged for all urinals is the same as formerly charged for properly constructed urinals, which means a self-closing urinal. Water troughs for stock: The charge was from \$1.50 to \$3.00. All blacksmith shops have water troughs and no charge is made for them. That covers all the changes, so far as specified in this list.

Question. During the time that you were secretary of the company did any member of the city council or any city official complain to the city of an insufficient water supply for city purposes?

Answer. No, sir. There was one request, however, made for extension for fire purposes.

Question. For an extension of mains?

Answer. It was in regard to a supply for hydrants.

Question. What did the company do?

Answer. They complied with the request of the fire and water committee. That was the only demand made of the city

134 during the time that I have been secretary of the company.

There was a communication from the city council stating that the city would like to know if we would make a reduction in the rates charged domestic consumers. That reduction was made the first of July, 1893. We replied that we would be glad to meet a committee from the city council and receive expressions of opinion as to what should be done. We never heard from any committee of the council, except in regard to the extension of mains for the purpose of supplying new fire-hydrants.

Question. In view of that communication from the city council the rates were reduced?

Answer. The reduction of family rates had been considered by the company prior to that communication and it was subsequently made.

Question. Has the city always paid the bills under this contract during the time that you have been secretary?

Answer. Yes, sir.

Question. And has never protested or refused to pay them?

Answer. No, sir.

Question. During the time that you were secretary, I think in 1892, were there not some extensive improvements made in the plant of the water company?

Answer. Yes, sir.

Question. What was the cost of those improvements?

Answer. In the year 1891 there was considerable trouble, especially in the upper part of the town, and in getting water on the upper floors of three-story buildings which had been recently constructed. These districts that I refer to had been rapidly built up with dwellings during the year 1891, and there was so much trouble the company saw that they needed to make improvements and bring to the city an additional supply. It was so late in the season of 1891 that it could not be done that fall, but work, however, was commenced, the pipe was bought, and the twenty-inch main, that

has been referred to as being supplied by the infiltration ditch, was laid down Alder street and connected at First. 135 Other improvements were made at various locations. A four-inch main was put in from Boyer avenue along Touchet street to the corner of Touchet and Cherry street a connection also being made with a main that had previously existed on East Sumach street, which didn't until that time connect with any main on Touchet street. A four-inch main was also laid on South Second street and two different mains were laid on South Palouse street, and I think on Chestnut street.

Question. Well, in round numbers, how much did those improvements and extensions cost?

Answer. The figures, as I remember them from that memorandum that I read a few moments ago, was something over ten thousand dollars.

Question. Were these buildings constructed near the reservoir?

Answer. In the southeastern part of the city, up in Reed's addition and Robert's addition, where the town has in the last two or years built right up to the reservoir.

Question. Before the year 1891 was that part of the city thickly settled or not?

Answer. There was considerable growth in that part of the city during 1891.

Question. How many three-story buildings are there?

Answer. Three.

Question. As secretary of the company has it been your business to visit the various houses in the city with a view of determining whether or not the water supply was sufficient?

Answer. I have always made it my practice, where I heard that a complaint was made, to investigate, so far as I could, into the truth of the matter.

Question. Have you decided that there is a full supply of water in the different houses in the city and in the different localities in the city?

Answer. To the extent of turning it on that way.

Question. How did you find the supply in general?

136 Answer. In general it is good now. The company had had some little difficulty in the summer of 1891.

Question. Have those difficulties been overcome very largely since?

Answer. Since the addition of the twenty-inch main there hasn't been near the fault-finding there was prior to that.

Cross-examination:

Question. I understand, Mr. Turner, that you became secretary of this company some time in 1892?

Answer. September first, 1891.

Question. September first, 1891?

Answer. Yes, sir.

Question. Then all the charges and all the entries in this ledger

prior to the entry of December 31st, 1891, were matters of which you have no knowledge?

Answer. No personal knowledge; no, sir.

Question. Had you been employed or had you any connection with the water company prior to the time you have stated, September first, 1891?

Answer. No, sir.

Question. The books of original entry, you say, have been destroyed?

Answer. No, sir; they are not in the possession of the company.

Question. Do you know where they are?

Answer. No, sir; I never saw them.

Question. Don't you know what became of them?

Answer. No, sir.

Question. Were they in the office when you went into the employ of the company?

Answer. That I couldn't say. The office at present has been removed from where it was at that time. The papers, books, and records were turned over to me by Mr. Winaus and I still have them. The book you refer to was not with them and was never turned over to me.

137 Question. You have no personal knowledge as to where they are?

Answer. No, sir.

Question. Have you ever made any search for them?

Answer. I never heard of the existence of a day book until within a day or two.

Question. You certainly knew there must be some original book of entry from which your books were posted?

Answer. I had no knowledge but what the books were made up from check stubs or vouchers or something of that kind. The entries didn't necessarily come from books.

Question. You say you don't know of your own knowledge how much money was expended between the date of the organization of the company and the entry which appears here, September first, 1891?

Answer. Nothing prior of September first, 1891.

Question. You have no personal knowledge of each of the items of December 31st, 1891?

Answer. That is the total for the year.

Question. A part of which you have personal knowledge and a part of which you have not?

Answer. Exactly; yes, sir.

(Mr. GILMAN, of counsel for defendant:- I wish to enter a motion here to strike out of the record all the testimony of the witness concerning the items that appear in the ledger from July first, 1889, up to and including December 31st, 1891.)

(This motion was objected to by Mr. McKinstry, of counsel for complainant.)

Question. Now, Mr. Turner, concerning the expenditures made

subsequent to September first, 1891, you have attempted to state what expenditures had been made from your memory?

Answer. Not in detail; no, sir.

Question. And you relied for the statements you have made upon the books of the company?

Answer. For the details; yes, sir.

Question. Since September first, 1891, you have kept books of original entry?

138 Answer. Yes, sir.

Question. Which books are still in the possession of the company?

Answer. Yes, sir.

(COUNSEL FOR DEFENDANT: I will here move to strike out all the evidence of the witness with reference to the expenditures made for improvements of the plant as here given, on the ground that it is incompetent, irrelevant, and immaterial, and not the best evidence.)

(Counsel for complainant objected to said motion.)

Question. What is the size of the ordinary building lot in Walla Walla, Mr. Turner?

Answer. What is commonly called a lot is 60 x 120 feet.

Question. What would be the rate charged by this company per month for a family occupying a lot 60 x 120, the house having a bath-tub and water-closet, water being used for irrigation purposes, and a cow being kept?

Answer. That would depend upon the size of the house and whether all of the remainder of the lot, after deducting the space covered by the house, was irrigated. We don't charge for the size of the lot, but for the space actually sprinkled by water.

Question. Assuming that the house was 30 x 40 feet and the entire lot irrigated?

Answer. The balance of the lot irrigated, did you say, and a bath-tub in the house?

Question. Yes; a bath-tub and water-closet.

Answer. For the seven months in the year the rate would be \$2.25; for the remaining five months, \$5.25.

Question. Do you know of any other water system in the State of Washington where the rates are higher?

Answer. I have no personal knowledge of any other system in the State of Washington. It is all hearsay with respect to the rates charged in other cities.

Question. Do you know that the rates in Seattle for that
139 same service is \$1.50?

Answer. I don't think your information is correct. No, sir.

Question. What are the rates there?

Answer. I can read them from the published rate books. That is the best evidence I can give.

(This question was here objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial,

and the witness' testimony would not be the best evidence, and also that it does not appear that the same condition exists in Seattle that exists in Walla Walla.)

Answer. The rate for families of eight persons or less, water-closet and bath additional, is \$1.00 a month. The rate for bath-tubs, private, six or less, is 25 cts.

Question. That wouldn't be included one bath-tub, would it?

Answer. Most assuredly not.

Question. Doesn't the rate given for families include bath-tub, water-closet, and house?

Answer. It distinctly says not. Water-closets, private closets, each 25 cts. Cows: For each cow, water supplied by house service or otherwise, 25 cts. That gives a rate of \$1.75 a month, without counting irrigation.

Question. Well, see what the irrigation is.

Answer. Gardens and lawns, one hundred and twenty feet front, where occupied by building supplied by one faucet or set of hose, free of cost. Each additional faucet or set of hose during irrigation season, 50 cts. a month, I think, unless my recollection is wrong.

Question. There is no charge where there is only one faucet or set of hose?

Answer. No, sir.

Question. You may examine the charge by the square yard and see whether one faucet is included or not.

Answer. Yes, sir; they are allowed to use one faucet and hose as they like.

140 Question. You have given everything now, have you?

Answer. Wait a minute. Their regulations are very much different from ours. That would make \$2.25 instead of \$1.50, as you stated.

Question. \$2.25 or \$1.75?

Answer. \$1.75, provided only one faucet is used for irrigation; yes, sir.

Question. Probably, if you made a charge for the number of faucets instead of the number of feet they would use more hose?

Answer. Yes, sir; they wouldn't use so much water as now.

Question. Now, can you tell me the rates in the city of Tacoma for the same service which the Walla Walla Water Company charges \$5.25 for?

Answer. Their family rate is \$1 for five rooms or less; each additional room, 10 cts.

Question. Make an average of seven or eight rooms.

Answer. That would make \$1.20 for seven rooms. Now, there is a charge for hose for each twenty-five-foot lot of 25 cts. That would make the family rate for sixty-foot front, exclusive of sprinkling, \$1.80 per month, payable for five months, the same as our rate. One horse and vehicle or cow, 50 cts. That would make \$2.30 for family rate.

Question. See what it would be for a sixty-foot lot for irrigation; wouldn't it be sixty cents per month?

Answer. Yes; sixty cents per month.

Question. Now, at Spokane?

Answer. I don't find Spokane rates here.

Question. Have you the Dayton rate?

Answer. Yes; I think so. The family rate is \$1.00 for six persons only. Bath-tub, 50 cts.; water-closet, 50 cts. I don't know whether they put the charge for a cow in private stable charges or not. That would be \$2.00 per month in Dayton for the house, and sprinkling for five months in the year would be \$1.00 for
141 the first lot—it doesn't state what the size of the lot is—and 75 cts. for each additional lot per month.

Question. What would be the rate?

Answer. \$2.00 for house use and \$1.00 a month for the lot.

Question. Now, Waitsburg?

Answer. The family rate for six persons or less is \$1.00. Bath-tub, 50 cts.; water-closet, 50 cts. Cows not mentioned. That would be two dollars for house use and \$1.00 for one lot and 75 cts. for each additional lot.

Question. Do you know of any city in the State of Washington furnished either by public water company or private where the charges are as high as are the present charges of the Walla Walla Water Company?

Answer. I stated that I didn't know the rates of any of them except from their published rates.

Question. Do you know of any where their published rates are as high?

Answer. Outside of irrigation they are all about the same as ours. The irrigation rates are a little higher here.

Question. All the cities of which you have published rates have a less rate, independent of the fact whether or not the population is greater or less?

Answer. Of all the cities of which I know the published rates.

Question. All the cities in Washington?

Answer. I am unable to say, because I have confined my investigations to this city. I can show you the published rates in other cities, but whether they have the same conditions that we have, I couldn't say.

Question. What other cities?

Answer. The surrounding cities.

Question. Are not the conditions here the same about as in Waitsburg?

Answer. I was never in Waitsburg in my life, although I am ashamed to admit it.

Question. Were you ever in Dayton?

142 Answer. No, sir.

Question. Don't you know that the conditions are the same?

Answer. I don't know what the condition of the use of the water

is in accordance to the size of the lawns, or anything about it. In fact, I have no personal knowledge to judge from.

Question. You say that there are three three-story buildings in town. I will ask you if there are not five—two school-houses that are three stories high, the Paine school and the Baker school.

Answer. Yes, sir; I was thinking only of the business district.

Question. In the locality where the Paine school-house is situated, could you get water on the third story?

Answer. I think so.

Question. Do you know whether they have water on the third story?

Answer. I had a conversation with the superintendent of schools recently in regard to the condition of several of the schools.

Question. I want you to state if you know whether or not they have water on the third story of the Paine school.

Answer. I never was there in my life.

Question. Is the same true of the Baker school?

Answer. I don't know whether water runs there; no, sir. There has never been any complaint made about it since I have been connected with the company.

Question. Prior to the laying down of the new mains, were they not compelled to pump to get water to the upper stories of three-story buildings?

Answer. I think in 1891 they were in order to get water to the third story, but not the second story.

Question. How much did you say was expended in improvements since the year 1887, from the data which you have?

Answer. I didn't state the footings; I read the items.

143 Question. Do you know how much it is?

Answer. I think it is \$87,000, dropping out one item that I don't know anything about.

Question. What amount of bonds have been floated?

Answer. One hundred thousand dollars worth.

Question. And sold?

Answer. Yes, sir.

Redirect examination:

Question. How do your meter rates compare with meter rates in other places?

Answer. They are identically the same in a great many cities, and somewhat higher than in other cities.

Question. In this State they are substantially the same?

Answer. I think so.

Question. Isn't it a fact that the climate of Walla Walla is a little drier than the sound cities, especially Tacoma and Seattle?

Answer. I think it is a fact.

Question. And isn't it a fact that the same amount of irrigation is not required there as in Walla Walla?

Answer. That is my understanding from hearsay. I never lived there in the summer.

Question. I noticed in your evidence, in giving the schedule rates in Walla Walla, you spoke of a cooler in saloons. What is that?

Answer. It is almost the universal practice in saloons here to use water for the purpose of cooling beer. There are only three or four saloons in town that use ice. These coolers are tanks with coils of water pipe running around inside, through which water is constantly flowing, and the bottles are prepared and put around the coils, which keep the beer quite cool for drinking purposes.

Question. Do you know whether the saloons in other places in the State of Washington use coolers?

144 Answer. I do not.

Question. About how many are there used here?

Answer. I think nineteen or twenty.

Question. Is there a continual flow of water through this coil of hose or whatever it is?

Answer. Yes, sir; that is the way they cool the beer.

Question. Do they keep the water running night and day?

Answer. Well, I am not used to being there late at night. During business hours they do. I know that to be the case.

Question. What are business hours?

(This question was objected to by counsel for defendant- as incompetent, irrelevant, and immaterial.)

Answer. Perhaps until one o'clock.

Question. In giving the irrigation rates, you said that the rates of the Walla Walla Water Company as compared with the rates of most of the cities in this State—the schedule price was substantially the same?

Answer. Substantially the same; I found very few points of difference.

Question. Are those points of difference sometimes in favor of the Walla Walla rates and sometimes other cities or not—the charge for ordinary domestic purposes, outside of irrigation purposes?

Answer. For family rates we charge the same as is charged in the smaller cities of the State. There are two or three larger cities that charge a trifle less; those I read from do.

Question. Have you examined the published rates of Cheney and Colfax?

Answer. I remember of reading the Cheney rates.

Question. Do you know what those rates are?

Answer. I don't find them in here. I think they must have been in another collection that I have. My recollection of the Cheney rate is that the family rate is two dollars a month. I have not the rate book here.

Recross-examination :

145 Question. Now, with reference to the question of irrigation.

The conditions in Dayton and Waitsburg are the same as those in Walla Walla, are they not—the climate is practically the same?

Answer. I presume so ; I never was there.

Question. You know the location well enough to know that the climate is practically the same ?

Answer. Yes, sir.

Question. In relation to the irrigation rates on the sound. I will ask you if you don't know that it is a fact that the only difference between there and here is that the irrigation season is shorter there.

Answer. I don't know anything about it. I was in Seattle only in the fall.

Redirect examination :

Question. What is your opinion as to whether two rival water companies can do business successfully in Walla Walla at this time ?

(This question was objected to by counsel for defendant on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I think that they cannot.

Question. Isn't it a fact that the principal value of this plant of the Walla Walla Water Company at the present time is owing to the contract that has been made with the city for the supplying of water for twenty-five years from the day the contract was made, and that the plant would be practically valueless were it not for the fact of this contract ?

Answer. I don't know that I exactly understand the question.

Question. For practical purposes, for the purpose of revenue, if there were any other water works in the city and the inhabitants of the city obtained their supply of water from some other source—from water works constructed by the city; for instance—the plant of the Walla Walla Water Company would be practically valueless, wouldn't it ?

Answer. So far as any earnings were concerned, certainly.

146 Recross-examination :

Question. You claim that you are furnishing water as cheap as it can be furnished, do you not ?

Answer. I never claimed that ; no, sir.

Question. As cheap as can be furnished with a fair profit for the company ?

Answer. Yes, sir.

Question. And that you are furnishing a sufficient supply of water ?

Answer. Yes, sir.

Question. Why, then, would the inhabitants of the city leave your company and go to the rival company in case there were a rival company ?

Answer. In case any other system was put in here I think there is no question that a large portion of the population would patronize it. In fact, many of the inhabitants of city that have been spoken to on that subject would certainly patronize the city water works before they would patronize a private institution.

Question. Now, couldn't the city by the saving of insurance rates and by furnishing water for its own fire system maintain a plant which they propose to put in independent of private consumers?

Answer. No, sir.

Question. Are you positive that they can't do that?

Answer. I don't think there is any question at all about that.

(Witness excused.)

(Signed)

HARRY H. TURNER.

Dr. WALTER M. ELY, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. Give your name and residence.

Answer. Walter M. Ely, Walla Walla.

Question. How long have you resided here, Doctor?

Answer. Nearly three years; three years the first of December.

147 Question. Have you ever held any official position in the city?

Answer. I was city health officer from August, 1893, until August, 1894.

Question. How long have you practiced medicine?

Answer. Four years.

Question. And have had considerable experience during that time, I guess?

Answer. Yes, sir.

Question. Is it the custom of physicians in localities where there is — fever to examine the quality of water used by the inhabitants of the city?

Answer. It is usual.

Question. Have you ever made any examination of water?

Answer. For organic impurities I have.

Question. Have you ever examined any of this water in particular?

Answer. Yes, sir.

Question. Have you ever examined the water of the Walla Walla Water Company with regard to organic impurities?

Answer. Yes.

Question. What examination did you make? How was the examination conducted?

Answer. Do you wish the details?

Question. No; not the details; just in a general way.

Answer. By chemical means.

Question. What was the result of that examination?

Answer. I never succeeded in finding any organic matter in specimens of Walla Walla water.

Question. In prescribing for patients have you ever required or do you require that this water should be filtered or freed from any of its impurities?

Answer. Do you mean to ask——

Question. In your prescriptions where water is contained in medicine?

148 Answer. Ordinarily when water is mentioned in prescriptions it is distilled water.

Question. In all prescriptions?

Answer. Yes, sir.

Question. What is your opinion of the water of the Walla Walla Water Company with respect to impurities?

Answer. As far as I am able to determine and judge, it is a good quality; I think as good as any of any city of which I have any knowledge.

(Witness excused.)

(Signed)

WALTER M. ELY.

Dr. SHAW, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. What is your profession?

Answer. Physician.

Question. How long have you been a practicing physician?

Answer. Nearly twelve years.

Question. How long have you lived in Walla Walla?

Answer. Seven years.

Question. Have you ever made an examination of any sort of the water of the Walla Walla Water Company, which supplies the people of Walla Walla?

Answer. I have.

Question. What examination did you make?

— I examined it for typhoid bacillus, organic impurities, and solid matter.

Question. With the express view of determining whether it was healthy or not?

Answer. Simply for my own satisfaction.

Question. What was the result of that examination?

Answer. I have never been able to detect any organic matter or bacillus matter in any case except one or two wells in town, but I haven't been able to from hydrant water from the hydrant in my office.

149 Question. What is your opinion as to the quality of the water?

Answer. It is one of the purest waters I ever had any occasion to examine—of any system water.

Question. Where have you ever examined any water before?

Answer. In the city of Bangor, the city of Lewiston, Maine, I have had occasion to examine the water.

Question. How does it compare with those cities?

Answer. As compared with that water it is superior.

Question. Is it as good and healthy as water can be?

Answer. It seems to me it is.

Cross-examination :

Question. You don't think it would be possible to be purer ?

Answer. Oh, no ; simply for system water it seems to me to be a good, potable water. All system water has certain impurities, but I have never been able to discover any organic impurities in it.

Question. Did you make a chemical analysis of it ?

Answer. Only for the purpose that I have indicated, for the purpose of finding chlorides or vegetable matter.

(Witness excused.)

(Signed)

E. E. SHAW.

CLARENCE O. BALLOU, being first duly sworn as a witness on the part of complainant, testified as follows :

Question. Give your name and residence.

Answer. Clarence O. Ballou ; Walla Walla.

Question. How long have you lived here ?

Answer. Twelve years.

Question. What business have you been engaged in during all of that time ?

Answer. Druggist.

Question. Are you familiar with the science of chemistry ?

Answer. To a certain extent.

Question. Practical chemistry ?

Answer. I have given it some study.

Question. Have you ever made a chemical analysis of water ?

150 Answer. To what extent ?

Question. Well, to discover the quality and ingredients of water.

Answer. I have.

Question. Have you had considerable practical experience in that line ?

Answer. At different times I have ; yes, sir ; quite often.

Question. Have you examined the water of the Walla Walla Water Company ?

Answer. I have.

Question. What was the result of that examination ?

Answer. Well, I have only examined it as to its organic impurities.

Question. Did you find it contained any organic impurities ?

Answer. Very slight.

Question. Doesn't most water contain some organic impurities ?

Answer. Yes, sir.

Question. What organic impurities did you discover ?

Answer. Well, as to that I couldn't say what they might be.

Question. What is your opinion of the Walla Walla water from the result of your investigation ?

Answer. I consider it very pure water.

Question. Have you ever made a comparison between this water and water of other cities ?

Answer. Not other cities; no; with well water.

Question. In this city?

Answer. In this city, and Mill Creek water and such as that.

Question. How does it compare with such water?

Answer. Well, it is far superior to any as to its organic impurities.

Question. Do you consider this a pure, healthy water?

Answer. I do, so much so that I would prefer it.

Question. Do you put up a great many prescriptions in this town?

151 Answer. I do.

Question. In which water is used?

Answer. Yes.

Question. Do you ever distill water in those prescriptions?

Answer. I do.

Question. Does it require that you should do so?

Answer. Only when it is specially called for.

Question. Isn't it specially called for as a rule?

Answer. Not as a rule; no.

(Witness excused.)

(Signed)

CLARENCE O. BALLOU.

JOHN M. HILL, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. What is your business, Mr. Hill?

Answer. Teller in the Baker-Boyer National bank at the present time.

Question. How long have you lived in Walla Walla?

Answer. I have lived in Walla Walla and contiguous thereto twenty-three years.

Question. During the year 1887 were you a member of the city council of Walla Walla city?

Answer. I was.

Question. Do you remember the enactment of an ordinance authorizing a contract for a supply of water by the Walla Walla Water Company to the city and inhabitants, and also the contract in pursuance of that ordinance executed in May, 1887?

Answer. Yes; I remember something in regard to it.

Question. Did you attend the council meetings prior to the time and about the time that ordinance was enacted and that contract made?

Answer. I did, sir.

Question. Do you remember if it was discussed?

Answer. Yes, sir; quite a number of times.

152 Question. What was the cause of that contract being made? What reasons as expressed by the statements and discussions of the council were there for making that contract?

Answer. For the purpose of securing a better supply of water.

There was an inadequate supply for all localities, and it was also for the purpose of securing water for fire purposes.

Question. At that time was there or not an adequate supply of water for fire and domestic purposes in the city of Walla Walla?

Answer. The greater portion of the city didn't have the advantage of having mains.

Question. Are those portions of the city now supplied with mains since then, to the best of your knowledge?

Answer. I think they are now quite well supplied.

Question. What portions of the city were not supplied with water at the time you speak of?

Answer. The four corners, you might say.

Question. Were there many complaints to the members of the council by the residents of the city concerning the inadequacy of the water supply?

Answer. They quite frequently received complaints from different localities of the city in regard to the inadequacy of the water supply.

Question. From what points?

Answer. From all these points I have mentioned.

Question. Was any estimate made by the council at that time of the probable cost of erecting water works for supplying the city and its citizens with water?

Answer. I don't remember distinctly in regard to what conversation was had about the matter, but it had been talked over quite frequently in regard to the city getting their own water works, and the question came up in regard to our indebtedness, etc., whether we could reach it or not.

Question. And what was the result of the discussions as to the general opinion of the council?

153 (Counsel for defendant objected to the witness attempting to state what the general opinion of the council was.)

Question. As to whether or not water works could be secured by the city without exceeding the constitutional indebtedness?

Answer. As a council we decided that it could not at that time.

Question. And that was the sense of the opinion among the council, and as a result of that opinion the ordinance was passed and the contract made?

(Question objected to and withdrawn.)

Question. I will ask you to state fully why this contract was entered into by the city and why this ordinance was enacted, instead of the city making preparations to secure their own water works.

Answer. One reason was that the city couldn't do so without incurring an indebtedness beyond the limit, and another was the opinion of the council at that time was that they were getting a contract for water that would be far better than they could possibly do if they should undertake to furnish their own service.

Question. Was the water works company at that time considered a responsible corporation?

Answer. I think it was. I have never heard anything to the contrary.

Question. Did the council at that time consider the amount of water available for their water supply sufficient for the city of Walla Walla?

Answer. Yes, sir; they made tests.

Question. What tests were made?

Answer. We went out on Mr. Abbott's farm, which lies east of the city, and spent quite a sum of money there excavating, and also had a fire-engine there to test it.

Question. What was the result of those tests?

Answer. The result was unsatisfactory at that time.

Question. And what conclusion did the council reach as to the availability of any other source of supply of water?

154 Answer. They considered at that time that it wouldn't be advisable to look any further, and entered into the contract with the company with the understanding that they could condemn it at any time. I know I held out for that to be inserted.

Question. Do you remember how that particular clause was inserted in a contract which provides that the city shall not construct rival water works during the period of twenty-five years for which the water company was supplying the city and inhabitants, if it is in there?

(This question was objected to by counsel for defendant- on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I know that that is inserted in that contract; the reading of it I don't remember.

Question. Do you remember any talk with the water company or its agents with reference to that clause, and their reasons for wanting the clause, etc.?

Answer. I don't just remember the conversation. I know I talked with some of them.

Question. Was that put in as an inducement to the water company to extend its system for the purpose of supplying outlying districts?

Answer. That is my understanding. I know by this being inserted in there they were protected from the city embarking in any new water works.

Cross-examination:

Question. Who was the man that dealt with the council at that time on behalf of the water company?

Answer. Mr. Eastman was the party.

Question. Where was he from?

Answer. Oregon.

Question. He was very active in securing that contract, was he not?

Answer. Not more than any other man would be in transacting business.

155 Question. Wasn't Mr. Eastman very active?

Answer. I think he was; he should have been.

Question. You think he should have been to get a good contract from the city?

Answer. Yes, sir.

Question. Do you know who drew the contract?

Answer. No, sir; it was referred to the city attorney.

Question. Do you know who drew the ordinance?

Answer. No, sir; I don't know; I suppose our city attorney or some one who had the matter in charge drew it.

Question. That is what you all supposed at that time?

Answer. I think we did; yes, sir; it was a matter of considerable public importance; people wanted it at that time.

Question. What led the council to believe that the people wanted it at that time?

Answer. I know a number of the council had been accosted in regard to complaints—that is, complaints had been made.

Question. Now, as a matter of fact, the only people who approached the council on that subject was Mr. Eastman and other agents of the Walla Walla Water Company, were they not?

Answer. No, sir.

Question. Who now do you recollect as being active in the behalf of the people in securing this contract that was not connected with the water company?

Answer. I don't know as I can call any one to mind at this time, but it had been agitated, I know, before Mr. Eastman became connected with the company.

Question. Wasn't there a pretty strong opposition by many of the representative people of the district to the twenty-five-year contract?

Answer. Not that I remember, although there has been some talk about it since that time.

Question. You recollect that Mr. Eastman was very active in the matter?

156 Answer. Well, he being interested, he would naturally be. Yes, sir; I remember he was active in the matter.

Question. And you can't recollect anybody who wasn't connected with the water company being at all active in the matter?

Answer. I was, for one, myself quite active. I lived in a locality that was not supplied with city water; and other members of the council were active. John Muntinga, I know, was one.

Question. How many members of the council were there at that time?

Answer. I think the same number as now—seven.

Question. Do you know how many of the council voted for that ordinance and how many against it?

Answer. No, sir; I do not at the present time.

Question. The council stood four to three, didn't it?

Answer. I can't tell you, I say.

Redirect examination :

Question. Do you remember whether a public meeting was held by the people of Walla Walla for the purpose of discussing the advisability of increasing the water supply for the city?

Answer. I think there was, but I wasn't present at that meeting.

Question. Mr. Eastman is dead now, is he not?

Answer. Yes, sir.

Recross-examination :

Question. Do you recollect who called that public meeting?

Answer. I do not.

(Witness excused.)

(Signed)

JOHN M. HILL.

Not being able to complete the testimony, the case was continued until tomorrow morning at nine o'clock.

WEDNESDAY, *September 26th*, 1894—nine o'clock a. m.

Court met pursuant to its adjournment of yesterday.

157 The respective attorneys and all parties interested being present, the taking of testimony continued as follows :

HARRY H. TURNER, being recalled as a witness on behalf of the complainant, testified as follows :

(COUNSEL FOR DEFENDANT: I will enter an objection to calling Mr. Turner on any matter already gone over. New matter I won't object to.)

Question. Since your examination of yesterday, Mr. Turner, have you made an additional examination of the published schedules of water rates in addition to those on the Pacific coast?

Answer. I have.

Question. Of what cities in particular are you prepared to testify as to the published rates?

Answer. Baker City, Oregon; Butte, Montana; Alameda, California; Calistoga, California; Marysville, Hayward, Napa, California; Pomona, Petaluma, Redding, Salem, Oregon; Reno, Nevada; Salinas city, Santa Barbara, California, and some others I would like to read. The old rates of Seattle, Washington; Sprague, Washington; and Valejo, California; East Portland, Oregon; Sacramento, California; San José, California; Astoria, Oregon; Montevilla, Oregon; Pendleton, Oregon; Stockton, California; Santa Rosa, California.

Question. Have you examined the domestic and irrigation rates of those cities?

Answer. Principally the rates mentioned yesterday for domestic use, including a cow, and for irrigation.

Question. Now, how do the rates of those various cities compare with the Walla Walla water rates?

Answer. They are fully as high and many are higher than the Walla Walla rates.

Question. Of what cities are the published rates higher than the Walla Walla rates?

Answer. I would have to answer on the whole by comparison with the published rates.

158 Question. Make a comparison with the published rates.

Answer. Baker City, Oregon, family rate is \$1.50, including bath-tub; water-closet, 50 cts., and cow, \$1.00. The sprinkling rate is \$3.50 a month for 60 x 120 feet, \$2.00 for each lot 50 x 100 or fraction thereof; each additional lot, \$1.50. That would make \$6.50 as against \$5.25 in Walla Walla. Butte, Montana, the rate figured in the same way makes about \$5.15 against Walla Walla, \$5.25. Alameda, California, the residence rate for the sized dwelling mentioned yesterday, 30 x 40 feet, is \$1.25 for one-story house and \$1.85 for two-story house; \$1.25 for the lowest house of that size. The charge for a private bath-tub is 35 cts.; for private closet, 50 cts.; for cow, 20 cts. The irrigation rate is exactly the same as the Walla Walla rate, $\frac{1}{2}$ cent per square yard; 50 cts. per 100 square yards, upon a basis of twelve months instead of five, making a total rate of \$9.50 as against \$5.25.

Question. Explain the Alameda rate once more.

Answer. The Alameda rate would be three dollars for a sixty-foot lot, the same as Walla Walla, payable twelve months in the year, or thirty-six dollars a year. The Walla Walla rate is three dollars for five months, or fifteen dollars for the season, making the Alameda rate on a five-months basis \$7.20, or figured for the year \$21.00, which is the same result figured by the year. California: For one-story house 30 x 40 the rate is \$1.85; for private bath-tub, 85 cts.; private water-closet, 60 cts.; for each cow, 30 cts. Water for irrigation is furnished at special rates or by meter rates, so I couldn't compare it, but the domestic rates and cow are \$3.60 a month as against \$2.25 in Walla Walla. Calistoga, California, the rate for family of not more than five persons from \$1.00 to \$1.50; private bath-tub, 50 cts.; water-closet, not given. No mention is made of any water-closet. The sprinkling rate is exactly the same as in Walla Walla, one cent for the first 50 yards and one-half cent after that. Oakland, California, the rates of the Contra Costa Company for a one-story house 30 x 40 is \$1.15 a month; bath-

159 tub, 50 cts.; water-closet, 35 cts.; cow, 15 cts.; irrigation rate, one-half cent a square yard upon the twelve-months basis in the year instead of five. Teko, California, the family rate was \$1.00, 10 cts. extra for each person over five; bath-tub, 35 cts.; water-closet the same, and 50 cts. for each where the family exceeds five. The irrigation is \$2.00 a month for a lot 66 x 132 or less. The irrigation rate is payable twelve months in a year against five in Walla Walla. Marysville, California, the family rate is \$1.50 for one-story house only; bath, 50 cts.; water-closet, 50 cts.; cow, 50 cts.; irrigation, 60 x 160 foot lot, 60 foot front, \$2.00 a month, payable twelve months in the year. Fresno, California, the family rate is for family not exceeding five people, \$1.50; bath-tub, 50 cts.; water-closet, 50 cts.; irrigation of lots, \$1.50 for each lot not more than 25 feet front, which would make \$3.60 a month for a 60-foot

lot. Hayward, California: For a family of five persons, \$1.50; bath-tub, 50 cts.; cow, 25 cts.; gardens and lawns, one cent per square yard, paid for continuously. Hollister, California, the family rate is \$1.50; private water-closet, 50 cts.; sprinkling, one cent per square yard for the first 50 yards, one-half a cent per square yard for all over fifty yards, the same rate as Walla Walla. Napa, California, single family of not more than five persons, from \$1.50 to \$2.50; private water-closet, 50 cts.; irrigation, 50 cents for the first 50 square yards, and one-half a cent per square yard for all after that. Pomona, California, the family rate for not more than five is \$1.50, and 15 cts. additional for each person over five; water-closet, 25 cts.; cow, 25 cts.; irrigation, 50 cts. for 100 square yards, the same rate as in Walla Walla. Petaluma, California, single family of not more than three people, \$1.00 per month; rates increased as the family increases; water-closet, 50 cts.; bath-tub, 50 cts.; cow, 20 cts.; irrigation, payable every month in the year, one-half cent per square yard, the same as the Walla Walla rate, payable twelve months in the year. Redding, California, single family of not more than five persons, including use of horse and cow, \$2.50; private water-closet, 160 \$1.50; irrigation, 75 cts. for the first 100 square yards; over 100 square yards, one-half cent per square yard. Salem, Oregon, family rate, \$1.00; bath-tub, 50 cts.; water-closet, 50 cts. I would like to take that back. I read that wrong. Dwellings, five rooms or less, one faucet only, \$1.00; in addition to hot and cold water, extra 25 cts.; bath-tub and water-closet, 50 cts. each; private stables, cow, 50 cts.; irrigation, from 25 cts. to 50 cts. for gardens and grounds of not more than 25 square yards; 50 cts. 25 to 50 square yards; from 50 to 75 square yards, 75 cts.; from 75 to 100 square yards, \$1.00; between one and two hundred square yards, one cent per square yard. The use of hose for washing sidewalks and windows during summer, in addition to other charges, 50 cts. per month. Reno, Nevada, lot 50 x 140, \$2.00. That is the family rate. Patent water-closet, 50 cts.; irrigation rate from the first of April to the first of October, one month longer season than ours, \$3.00 a month for a lot 50 x 100; \$1.00 per month for each additional lot. Salinas City, California, family rate of not more than five persons, \$1.25, with 20 cts. additional for each additional person; private water-closets, 50 cts.; cow, 25 cts.; irrigation, not more than 50 square yards, 50 cts. per month: each square yard in excess of fifty, one-half a cent per month; same rate as Walla Walla, payable the year around. Santa Barbara, California: For private residences occupied by not more than three people, one dollar; one occupied by over three people to six people, \$1.50; bath-tub, 25 cts.; water-closet, 25 cts.; cow, 25 cts.; sprinkling rate, one-half cent per square yard; reduction of $\frac{1}{2}$ is made where the rate is paid the year around; otherwise, for less than a year, the rate stands as mentioned. Sprague, Wash., residences, \$2.00; nothing said about irrigation.

Question. Are you through with the cities except Seattle and Tacoma?

Answer. There are several others. I will just call attention to

the fact that the Seattle rates at present were not adopted until November, 1893.

161 Question. Let me interrupt you. You testified yesterday with reference to the rates in Seattle and Tacoma. What rates were those about which you testified?

Answer. The rates adopted November 20th, 1893.

Question. Do you know what the rates in Seattle and Tacoma were prior to that date?

Answer. I have the published rates here from which I can read. The Seattle family rate for six persons or less was \$1.00; each additional person, 10 cts.; bath-tub, 50 cts.; water-closet, 50 cts.; irrigation of lawns, for each lot 60 x 120 foot or less, \$1.50 per month. The Tacoma rate before the adoption of the last rates read yesterday is for dwelling-house, \$1.00 to \$1.50; bath-tub, 50 cts.; water-closet, 30 cts.; sprinkling with garden hose of the lot—I don't know what the size of the Tacoma lot is; I suppose, though, 25 x 100—from 50 cts. to \$1.45 per month, according to the size of the lot. The size of the lot is not mentioned in the rates.

Question. For what time does that rate cover—for how many months in the year?

Answer. It isn't set forth in these rates. Pendleton, Oregon, the family rate for one hydrant only is \$1.50 per month; bath-tub, 50 cts.; water-closet, 50 cts.; cow, one dollar; the sprinkling rate for a lot 50 x 100 is \$2.25; lot 60 x 120 feet would cost \$3.25 per month. Astoria, Oregon, family rate of five persons or less, two dollars a month; bath-room, same sized family, hot or cold water, one dollar a month. Additional charges: 25 cts. for each additional person in the family; water-closet, one dollar a month for family of five or less; 25 cts. for each additional person; for cow, one dollar a month; garden hose, for each 250 square yards or less, \$2.50; all over 250 square yards, one cent per square yard. Montevilla, Oregon, family rate, six persons or less, one dollar; 10 cts. for each additional person; bath-tub, 50 cts.; water-closet, 75 cts.; sprinkling, \$2.50 for lot 60 x 120 feet. A cow is not mentioned.

162 Stockton, California, family rate, not exceeding five people, \$1.50; 25 cts. for each additional person; private water-closet, 50 cts.; private bath-tub, 50 cts.; irrigation of lot of fifty foot front, including water for family use, \$24 per year. That would be six dollars for irrigation for a fifty-foot lot, or \$7.20 for a sixty-foot lot, providing the depth is 120 feet. That would be a charge of \$1.40 a month for a season of five months. Santa Rosa, California, families of five persons or less, \$1.00; each additional person, 15 cts.; water-closet, 25 cts.; bath-tub, 25 cts.; private stable, charge for one animal, 40 cts.; irrigating flower gardens and lawns, 50 cts. for 100 square yards per month.

Question. Is that all?

Answer. I would like to call attention to the rule in Seattle in connection with irrigation: No person shall use any water for irrigation or sprinkling during the progress of a fire in the city, and all irrigation in the city shall be immediately stopped when an alarm is sounded, and shall not be begun again until the fire has

been extinguished. For any violation of this rule a penalty of ten dollars for each offense shall be imposed and taxed against the person in the premises supplied, and the water shall be turned off thereafter, and in no case shall water be turned in any such premises until such penalty has been paid. Other fines: One dollar to two dollars for a violation of hours of sprinkling, leaky faucets, etc.

Question. Do you know what rate is charged the city in some of those instances that you have given for hydrants?

Answer. The water works in Seattle charges the city five dollars a month for each hydrant, one dollar a month for each fire-cistern, five dollars a month for each engine-house. The custom is quite universal, from these published rates, in all cities where the supply is furnished the city by a water-works system to charge up to the city the rental for fire-hydrants, and runs all the way from two dollars a month to five dollars a month. This city pays \$1,500 for all of its city service, inclusive of water for street sprinkling, the right to flush sewers, and the right to attach as many hydrants to the plant of this company as they need, within the life of the contract, without any increase of that charge.

(COUNSEL FOR DEFENDANT: Permit me to suggest the court will construe the contract.)

Question. How many hydrants are there in the streets of Walla Walla?

Answer. Fifty-two on the first of this year; I can't say how many now.

Question. Do you know whether any have been added since then?

Answer. I don't know. They put them in as they require them.

Question. Do you know whether the water companies in any of the other cities referred to are required to furnish water for flushing sewers if necessary?

Answer. I think not, except they make specific charges for so doing. There is an additional point in regard to the rates—that in almost all of those cities, I think, with very few exceptions, a regular charge, running from one dollar up per month, is made for private stables, with the privilege of keeping one horse and washing one vehicle. No charge is made to any stable in this city—any private stable—for washing vehicles and the use of hose for sprinkling flowers, washing windows, washing porches and board walks, and for any other purpose than sprinkling lawns is included in the family rate, and there is no extra charge made here for private stables.

Question. Do you know what the custom is among water consumers of Walla Walla with reference to the use of water for irrigation—the extent of that use?

Answer. There is a very extensive use of water here for irrigation. During ordinary seasons there is generally a period of about

four months that there are no rains to amount to anything, and it is necessary to irrigate extensively.

Question. Continuously?

Answer. In a great many instances continuously. Of course, there are some consumers who don't use water longer than they require it; others use it a great deal longer than necessary.

164 It is regarded by the water company as the source of its principle waste.

Question. How long have you lived in Walla Walla?

Answer. It will be six years in December.

Question. Are you familiar with the climate of Walla Walla?

Answer. Quite so; yes.

Question. What is the general character of the climate in the summer time?

Answer. In the summer time the climate is very dry and very hot.

Question. Do you know the average rainfall in Walla Walla?

Answer. I don't recollect it.

Cross-examination:

Question. What do you mean when you say the people of Walla Walla during the dry season use water for irrigation continuously?

Answer. I said in some instances they use it.

Question. Isn't it a fact that regular hours are established by the water company for the use of water, and that it is shut off if those rules are violated?

Answer. We have regular hours for irrigation, and in some few instances water has been shut off; more usually not.

Question. As a matter of fact, haven't you sent men around to see that people don't use their hose over the time allowed and when they were found so using it given directions to shut the water off?

Answer. No man was ever sent out by this company or any official connected with it who had instructions to shut off any water until the consumer had been notified twice and a record made by the man giving the notification of the notification. The company held that after repeated notice, with the addition of public notice in the local newspapers, that that was all the leniency in the matter that could be reasonably expected.

Question. Now, you say that your company makes no charge for private stables. Isn't it a fact that it makes a charge for animals?

165 Answer. It has never done so since I have been connected with it. There is not a single consumer in Walla Walla charged for animals.

Question. Your published rates show a charge for animals, do they not?

Answer. No, sir.

Question. The charge for animals is included in the family charge or irrigation charge?

Answer. We make no charge for animals. It is in the family rates, I suppose, if people keep the animals for the family.

Question. You say in other cities the companies that are supplying water are not required to furnish water for flushing sewers. How do you know that?

Answer. From the information obtained from the published rates.

Question. You obtained no information of the contract?

Answer. The published rates state what their charges are for. That is all the knowledge I have.

Question. You have with you there a large number of schedules for irrigation charges in different cities. These you have just detailed are the companies you have picked out as charging a higher rate or as high a rate as is charged in the city of Walla Walla?

Answer. Yes, sir.

Question. Now, are the most of those places that you have just mentioned small places or large places?

Answer. Most of them are as large or larger than Walla Walla. Some, however, are probably smaller.

Question. You say most of them are larger than Walla Walla. Do you know what the population of Baker City, Oregon, is?

Answer. I have heretofore compared the rates with a view of getting at the population of the various towns.

Question. Do you think that Baker City is larger or smaller?

Answer. I don't know.

Question. Butte, Montana?

166 Answer. Larger.

Question. Alameda, California?

Answer. I can't say in regard to any town in California. I have never been in the State.

Question. You have some knowledge as to the population of those various places?

Answer. I have no knowledge to enable me to testify.

Question. You testified that most of them are larger than Walla Walla?

Answer. I have already said that I have heretofore examined into the population of other places in connection with their rates.

Question. Now, from the knowledge you have heretofore so gained, what would — say as to the population of Benicia, California—is it larger or smaller?

Answer. I can't say.

Question. Calistoga?

Answer. I can't say.

Question. Teko?

Answer. I can't say.

Question. Marysville?

Answer. I have already said in regard to California; outside of the principle cities I couldn't say.

Question. These cities in California, with the exception of Oakland, are in the arid district of California, are they not, where water has to be brought long distances?

Answer. I don't know anything about the condition in regard to the water supply or where it is brought from.

Question. In searching among your published rates for cities that charge as much as or substantially as much or more than the Walla Walla Water Company, this is the result of your work, these cities that you have named?

Answer. Yes, sir.

167 Question. From your examination, are most of those places supplied with public water works or by private water works?

(This question was objected to by counsel for complainant on the ground that it is indefinite and uncertain.)

Question. Don't you understand it, Mr. Turner?

Answer. I think so. It is almost equally divided, but in almost every instance in the California cities I think the rates are fixed by ordinance of the city council.

Question. Just take your list there and let us see. How is Alameda supplied?

Answer. The water rates of the Alameda Water Company, established by the board of trustees of the town of March 27th, 1893. It appears to be city water works.

Question. Isn't it supplied by a company where the town trustees have the right to fix the rates?

Answer. It may be, possibly. It doesn't appear from the rates.

Question. Benicia?

Answer. Well, it starts "The board of trustees of the city of Benicia do ordain" by ordinance.

Question. Calistoga?

Answer. Ordinance No. 16.

Question. Oakland?

Answer. Ordinance No. 41 or No. 1257: "Be it ordained by the council of the city of Oakland."

Question. Isn't it supplied by a private company?

Answer. It is regulated by ordinance.

Question. You understand that the cities have the right to fix the rates within certain limits?

Answer. I don't know as to that.

Question. Chico?

Answer. "Water rates, rules, and regulations of Chico, established and approved according to law by the town of Chico."

Question. Is Marysville a private company?

168 Answer. I don't know; there is nothing in the rates to show by the Marysville Water Company.

Question. They are the rates of the Marysville Water Company, I know, but I am asking whether the water is supplied by a private company or the municipality.

Answer. I don't know; the rates say the Marysville Water Company; I don't know whether it is municipal or private.

Question. Fresno?

Answer. Ordinance No. 272.

Question. Is it supplied by the Fresno Water Company?

Answer. "The rates of the Fresno Water Company," regulated by ordinance No. 272.

Question. Hayward?

Answer. Ordinance No. 137.

Answer. That is the municipality, isn't it?

Answer. I don't know who furnishes the water.

Question. Hollister?

Answer. The Hollister water works.

Question. Napa?

Answer. Ordinance No. 190, regulating, I think, the rates of private companies.

Question. Pomona?

Answer. Pomona City water works.

Question. Petaluma?

Answer. Ordinance No. 75, regulating the rates of private companies.

Question. Redding?

Answer. That is a private company; yes, sir.

Question. Salem?

Answer. At Salem is a private company.

Question. Reno, Nevada?

Answer. That is the Reno Water, Land, and Light Company, a private company.

Question. Santa Barbara?

Answer. It is a private company. The water rates are 169 fixed by the city council.

Question. Astoria?

Answer. That is a private company.

Question. Do you know of what date most of those schedules are?

Answer. Most of them are the last water rates of the companies; I sent some time last fall for the rates of 150 different cities, and these are the rates.

Question. You spoke of some of those cities making an irrigation charge for twelve months in the year. Are not those charges made in the cities where irrigation is necessary for the whole time or most of the year, and the season that you have fixed for irrigation in Walla Walla comprises all the time that it is necessary to irrigate or supposed to be?

Answer. Since I have been here I have seen it on two different occasions pretty dry through April. The seasons vary. As a basis for a charge for water, it is really a charge for the season—from the first of May to October—at three dollars a month. We regard it as \$15.00 a year for the right to use water for irrigation.

Question. As a rule it is not necessary to irrigate here before May or later than the first of October?

Answer. As a rule, no, sir.

(Witness excused.)

(Signed)

HARRY H. TURNER.

L. H. BOWMAN, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. Mr. Bowman, where do you reside?

Answer. In Walla Walla.

Question. How long have you resided here?

Answer. I have been here off and on for sixteen years.

Question. What is your business?

Answer. Real-estate agent, and I am raising fruit.

Question. What was your occupation in 1887; did you hold any official position here?

170 Answer. I was a member of the city council.

Question. Were you a member of the city council when an ordinance was passed by the city authorizing the execution of a contract for a supply of water by the Walla Walla Water Company to the city and its inhabitants?

Answer. Yes, sir.

Question. And when the contract was entered into between the city and the Walla Walla Water Company?

Answer. Yes, sir.

Question. Were you present during the council meeting in which that ordinance was discussed?

Answer. Yes, sir.

Question. And when the contract was discussed?

Answer. Yes, sir.

Question. Did you make any investigation as to the condition of the city at that time with reference to the supply of water usable for city purposes, extinguishing fires, etc.?

Answer. I was on a committee that worked on it.

Question. How was the city supplied with water for city purposes with reference to a sufficiency or insufficiency of water supply at that time?

Answer. At that time we had no hydrants here.

Question. For what reason?

Answer. The pipes were not large enough. There had never been any arrangements made for fire purposes. We used the streams.

Question. What was the reason for enacting that ordinance and making that contract referred to?

(This question was objected to by counsel for defendant-on the ground that it is incompetent.)

Answer. To get a better water system for the city to furnish water for fire purposes, flushing sewers, etc.

171 Question. Do you know whether the supply has been abundant since the making of this contract?

Answer. It has been increased a great deal. Larger mains have been put in, and hydrants have been put in at different parts of the city.

Question. Do you know whether the city generally or the resi-

dents of the city were supplied with water in all parts of the city prior to the making of this contract?

Answer. I don't think so; not a sufficient amount, at any rate.

Question. Do you know what districts or some district that was not supplied with water?

Answer. I think the lower part of the Second ward was not supplied; in fact the greater part of the Second ward was not supplied, and the Fourth ward was not supplied.

Question. Do you — whether, since the making of that contract, those wards have been supplied?

Answer. There has been more water put on—larger mains put in.

Question. Did the council prior to the enactment of that ordinance and the execution of that contract consider the proposition of constructing its own water works?

Answer. I think so. There was a test made. There was a hole dug up above town here where they tried to see if they could find water. They couldn't get sufficient water. I think they made a test with the fire-engine.

Question. Did the council make any estimate of the probable cost of a water supply and water works constructed by the city?

Answer. I believe they did, but I don't remember what that was, though. That has been a good while ago.

Cross-examination :

Question. You say that before the passage of this ordinance and the making of this contract there were parts of the city that were not well supplied with water?

Answer. Yes, sir.

Question. And that all parts of the city have been well supplied with water since?

172 Answer. It has been better supplied than it was, but I don't think there is enough now.

Question. You wouldn't consider that the present supply is adequate, would you, to the wants of the city?

Answer. Of course, I am not as well posted as some other men. All I know is the complaints that come to me from over the city.

Question. Considerable came from the part where you live?

Answer. Yes, sir; where I live we don't have any. It is too far out. The mains don't extend that far.

Question. Did the city council, at the time of entering into the contract and passing of this ordinance, consider how much pressure would be needed?

Answer. I think the pressure was calculated at a certain amount. I don't remember what.

Question. Fifty pounds?

Answer. I don't remember.

Question. The city thought they were getting a contract for a certain pressure?

Answer. Certainly.

Question. Are you aware that they did not?

Answer. I have heard some complaint to that effect.

Question. That is, it was generally considered by the council and others that you didn't get the contract that was represented you would get, was it not?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I left the council along soon after that. I have heard that they didn't get as much as they thought they were getting.

Question. Didn't you as a councilman, as far as you were concerned, think that you were contracting for a certain amount of pressure for the fire-hydrants?

(This question was objected to by counsel for complainant on the ground that it is incompetent.)

Answer. Yes, sir.

173 Question. Have you examined the contract since it was made?

Answer. No, sir.

Question. Do you recollect who it was that first commenced the agitation of this scheme for the contract between this city and the Walla Walla Water Company?

Answer. No, sir.

Question. Do you recollect one Mr. Eastman, who came from Oregon City here seemingly for the purpose of working up this business?

Answer. I was well acquainted with Mr. Eastman; he bought some property on my recommendation before starting up. I don't know that he bought other property on my recommendation, but I met him first in Portland, and he asked me if there was anything here that would make a good investment.

(This answer was objected to by council for complainant on the ground that it is not responsive to the question.)

Question. Mr. Eastman was a particular friend of yours, was he?

Answer. Yes, sir.

Question. Now, Mr. Bowman, was any petition ever presented to the council on the part of the citizens of the city or any of them requesting any such action on the part of the council?

Answer. I disremember about that.

Question. Haven't you any recollection on the subject?

Answer. I know we had some kind of a meeting and a good many citizens were called in.

Question. Do you recollect by what vote it finally passed the council?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial.)

Question. Was it four to three?

Answer. I don't remember.

Question. Mr. Eastman and his associates frequently appeared before the council in relation to this matter, did they not?

Answer. Mr. Eastman made a statement of what they could do before the council, I think, on two different occasions.

174 Question. He appeared there several times, didn't he?

Answer. I only remember of two different occasions when he appeared and made explanations.

Question. He worked actively with the councilmen outside of the meetings, did he not?

Answer. I don't know. He never talked to me only a time or two in regard to what he wished to do. I think William Stine was the man that did most of the work with the council; at least he talked to me.

Question. Mr. Stine was a member of the council, wasn't he?

Answer. I believe so, but I am not positive about that.

Question. Do you live within the city limits?

Answer. Yes, sir.

Question. There is no water at all up to the present time in your part of the city, is there?

Answer. There is no water any further down than, I think, on Tenth or Eleventh; Twelfth, I think. I live on Thirteenth street.

Question. You live on Thirteenth street?

Answer. Yes, sir.

Question. Between what streets?

Answer. Between Elm and Cherry. My house would stand in an extension of Pine street if it was opened that far.

Question. You are able to get water from some other source and your neighbors are?

Answer. Yes, sir; we could get water enough if the pipes were extended.

Redirect examination :

Question. How near the city limits do you live?

Answer. Inside.

Question. How far from the city limits?

Answer. The city limits extend a quarter of a mile west of my house.

Question. How many houses are there in your neighborhood?

Answer. There — two houses on that forty I own.

175 Question. On the forty acres?

Answer. Yes, sir.

Question. Is it acre property out there entirely?

Answer. Yes, sir; it is all acre property. I think there is no property divided into lots further down than Thirteenth street.

Question. How near your house do the mains of the water company extend?

Answer. Six hundred and sixty-six feet. I have been measuring to see about having water put in.

Recross-examination :

Question. You say that William Stine, as a member of the council, was active in the securing of this contract ?

Answer. He was the first man that I heard talk about it.

Question. Do you remember whether or not he was also a member of the Walla Walla Water Company ?

Answer. I do not.

Question. Whether he was a stockholder in it ?

Answer. I don't know.

(Witness excused.)

(Signed)

L. H. BOWMAN.

— ESTEB, being first duly sworn as a witness on the part of complainant, testified as follows :

Question. Were you a member of the city council of Walla Walla in 1887 ?

Answer. I think so.

Question. You heard the testimony of Mr. Bowman ?

Answer. Yes, sir.

Question. Do you remember the enactment of the ordinance and the execution of the contract referred to in his testimony ?

Answer. Yes, sir.

Question. Were you present at the council meeting at which this contract was discussed and the advisability of passing the ordinance ?

Answer. Yes ; I think I was.

176 Question. Did you take part in those discussions ?

Answer. I think so.

Question. Was it generally deemed advisable by the council that the water company's plant should be extended and improved for a better supply of water to the city of Walla Walla and its residents ?

Answer. Yes, sir.

Question. For what reasons was this ordinance enacted and contract made ?

Answer. We thought we would get a better supply of water and it would be cheaper for the city.

Question. What was the state of the water supply at that time ?

Answer. There were a great many complaints about water—about there not being force enough and not extending out to a great many places that it should.

Question. What part of the city at that time was furnished with water ?

Answer. I couldn't say.

Question. In general terms ?

Answer. The center of the city. I don't know how far it extended out now. I probably knew at that time.

Question. Do you know some of the additions that were not supplied with water ?

Answer. I don't know as I do.

Question. You know that there were some districts that were not plentifully supplied?

Answer. Yes, sir.

Question. How was the water supply with reference to water for city purposes—with reference to extinguishing fires?

Answer. I don't think it was as good as it ought to be at that time.

Question. Were there any hydrants attached to the mains?

Answer. I don't think there were. I think those were put in afterwards.

Question. Do you know the size of the mains laid down at 177 that time?

Answer. I don't know. They were small, however. I remember that.

Question. Were they large enough to attach hydrants to them?

Answer. I don't think they were. I don't remember.

Question. Was this fact one of the reasons for making the contract between the city and the water company?

Answer. Yes, sir; I think so. They represented that they would put in larger mains, if I remember right.

Question. Have those larger mains been laid down?

— — —

Cross-examination :

Question. You say there were complaints of insufficiency of the water supply and of its force?

Answer. Yes, sir.

Question. Before this ordinance was passed and this contract was made?

Answer. Yes, sir.

Question. Do you know whether there have been any complaints since that or not?

Answer. I can't say.

Question. You have never heard any since?

Answer. Oh, I don't know, but I have heard some complaints since, too.

Question. Have you heard more before or more since?

Answer. That I can't say.

Question. Now, you say you thought one reason for the passing of that ordinance was that it would be cheaper for the city—cheaper than what?

Answer. Well, the city was paying so much for some certain amount before, but I don't remember what it was.

Question. The city was paying something for water?

Answer. I think so.

Question. To whom, and for what purpose?

Answer. I can't say positively.

Question. As a matter of fact, the city itself had no contract for water before this ordinance was passed and this 178 contract made?

Answer. I can't say.

Question. Your recollection is not clear as to what contract the city had for supplying itself with water for fire purposes?

Answer. No, sir; I don't remember what it was.

Question. Now, as a matter of fact, to refresh your recollection, were not they paying \$15 or \$20 a month for supplying the city buildings and use of cisterns for the purpose of supplying water for fire purposes?

Answer. There was something of that nature. I don't know what their contract was, but they had cisterns, I know.

(Witness excused.)

JOHN A. TAYLOR, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. State your name and residence.

Answer. John A. Taylor; Walla Walla.

Question. How long have — resided in Walla Walla?

Answer. Eighteen years.

Question. What is your business or profession?

Answer. I have been justice of the peace and notary public and some other things; I don't know what all. I also own the sprinkling plant of the city.

Question. How long have you owned the sprinkling plant?

Answer. Nine years.

Question. Since the year 1887 have you been engaged in sprinkling the streets of the city?

Answer. Yes, sir.

Question. From what source do you get your water for sprinkling the streets?

Answer. Since 1887?

Question. Yes.

Answer. Well, I got a portion of it from the water company's water.

179 Question. What water company?

Answer. Well, it is the only water company here.

Question. The Walla Walla Water Company?

Answer. The Walla Walla Water Company; yes.

Question. Did it come from the stand pipe that is connected with one of the mains of the Walla Walla Water Company?

Answer. The contract that the city had with the water company was that they should furnish water delivered by a two-inch pipe into the tank that I tapped.

Question. The stand pipe?

Answer. Not the stand pipe. It was to be delivered through a two-inch pipe from the main to the tank that I used water from. When I tap that tank for sprinkling I can load the wagon in about two minutes; I can draw water faster from the stand pipe.

Question. During what season do you sprinkle the streets?

Answer. From the first of April to the first of October, six months.

Question. Have you always had a sufficient supply of water for sprinkling purposes?

Answer. For the first year or two the tank that the water company furnished was standing at the upper end of town here, and it wouldn't supply two wagons, and I got water from the flume to run one wagon. The tank at first stood at the bridge on Third street, and then we moved it down on Alder street, and we got more pressure of water, so that I could run two wagons from that place.

Question. Since that time have you always had sufficient water for your wagon supply?

Answer. Yes, sir.

Question. You have never made any complaints about the water supply?

Answer. No, sir. This last year it was inconvenient for me to load both wagons at that place, and I asked the water company, as a matter of convenience, if they would let me tap their tank higher up—that is, to put in another tank on their main, stating
180 that I could get water enough at that one place, but that it would pay me better to load at two places, and they allowed me to put in another tank on their main.

Cross-examination :

Question. Mr. Taylor, you run the sprinkling business, collecting your compensation from the abutting property-owners on the streets sprinkled?

Answer. Yes, sir; every man pays for his frontage.

Question. Do you know whether or not the property-owners are allowed by the water company to sprinkle the streets from the hydrants on their grounds or homes?

Answer. I don't know anything about that.

Question. Do you pay anything to the company for the water you get?

Answer. To the water company?

Question. Yes.

Answer. I have never paid them anything.

(Witness excused.)

(Signed)

JOHN A. TAYLOR.

WILLIAM H. KIRKMAN, being first duly sworn as a witness on the part of complainant, testified as follows :

Question. What is your business, Mr. Kirkman?

Answer. I am an attorney, and clerk of the United States court.

Question. How long have you resided in Walla Walla?

Answer. About twenty-four years.

Question. Do you remember of the execution of a contract to the Walla Walla Water Company by the city of Walla Walla for a supply of water to the city in May, 1887?

Answer. Yes, sir; I remember something about it.

Question. Do you remember whether at that time and prior to

that time the city of Walla Walla and the people of the city were sufficiently supplied with water in all parts of the city?

Answer. Well, I know they were not supplied in all parts of the city.

181 Question. Do you remember some localities in which the water supply was insufficient?

Answer. The only locality that I have any personal knowledge of is our own in Cain's addition. We had water in our own house at that time, but we were unable to get water at all times in the upper story of the house, and the section of the city up above us there was entirely without water.

Question. In Cain's addition was that?

Answer. Yes, sir; in the greatest part of it, at any rate.

Question. Have you any knowledge of the insufficiency of water supply in any other districts of the city at that time?

Answer. I can't say positively about any other districts. I know there were complaints about other districts. I can't say just what parts.

Question. Is your district at present supplied with water?

Answer. It is.

Question. Since when has it been sufficiently supplied?

Answer. Well, since the making of this contract; since the year 1887.

Question. What extensions and improvements of the water plant have been made since May, 1887, within your recollection and knowledge?

Answer. Well, I couldn't say. All I know is that that part of Cain's addition lying north and east of us has been supplied since 1887. I am not familiar with the lay of the mains, from the fact that they were probably laid when I was away from home.

Cross-examination:

Question. I understand you to say, Mr. Kirkman, that all you know as to the water supply before 1887 is that you in your particular locality didn't have water enough. Is that the fact?

Answer. Well, I think in 1887 we had water at our home, but the rest of that section up above there didn't have. In fact it only extended as far as our home. Since then it has been extended beyond.

182 Question. You have been able since 1887 to get a sufficient supply of water for all purposes?

Answer. I think we have. I think there has been one season since 1887 that we were somewhat troubled about the water supply.

Question. Do you recollect what season that was?

Answer. No; I couldn't say just what season it was.

Question. I believe you have an interest in the water company, Mr. Kirkman?

Answer. I have not personally. The estate of which I am administrator and an heir has.

Redirect examination :

Question. You spoke of the dry season of 1891?

Answer. I didn't say what season. I think it was in 1891, but I wouldn't answer that positively.

Question. In what district of the city was there an insufficiency of the supply of water during that year or during a few months of that year?

Answer. Our addition is in the principal part of the city. There are comparatively few that have a higher elevation in the city. I think the principal part of Cain's addition has as high an elevation as most any other part in the city.

Question. What was the condition of that part of the city prior to the time you mention with respect to being thickly or thinly settled?

Answer. Well, it was thinly settled, with the exception of two or three streets that were very thinly settled at that time.

Question. There was a very rapid growth and development in 1891, wasn't there?

Answer. There was.

Question. Do you know whether those districts that had not a sufficient water supply have had that deficiency since remedied?

Answer. It has.

Question. Were there any extensions and improvements made by the water company in their plant after those complaints
183 in regard to an insufficiency of water in that section of the city?

Answer. There was.

Question. Do you know when those extensions and improvements were made?

Answer. A great many of them have been made after I went East to school. Some were made before. There were no mains up there along about the year 1887 or 1888.

Question. And in 1892 do you know anything about the improvements or extensions of the water pipes?

Answer. No; I wouldn't know about that; I wasn't here in 1892.

(Witness excused.)

(Signed)

WILLIAM H. KIRKMAN.

Dr. HOWARD R. KEYLOR, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. What is your business or profession?

Answer. Physician and surgeon.

Question. How many years have you been practicing medicine?

Answer. Twelve years.

Question. In what places?

Answer. Walla Walla.

Question. Have you ever made any test or chemical analysis of water of the Walla Walla Water Company?

Answer. Three or four days ago; yes, sir.

Question. What was the result of that analysis?

Answer. The result was I considered it a very pure water.

Question. Describe generally how this analysis was made.

Answer. Well, the analysis was made for four different ingredients. Water to be considered pure should not contain more than six grains of solid matter to the gallon. There should be no trace of the nitrites or nitrates, and of — of ammonia there ought not to be more than 35-10,000 grains to the gallon. Water should be tasteless, odorless, and clear. I examined this water and found it
184. tasteless, odorless, and clear. The proportion of solid matter to the gallon was from $2\frac{1}{2}$ to three grains to the gallon. Of nitrites there were none. Of nitrates there were none, and the proportion of — of ammonia was 35-10,000 to the million grains. The examination revealed only vegetable remains.

Question. Have you ever made an examination of the water which was consumed in other cities?

Answer. I have in Baltimore, where I was a student in connection with the hospital for a year, simply under the direction of others at the time.

Question. How does this water compare with the water of other cities?

Answer. By analysis this water compares very favorably. Water, by chemists, is divided into four different classes: pure, usable, suspicious, and impure. This would be classed pure water.

(Witness excused.)

(Signed)

HOWARD R. KEYLOR, M. D.

OSKAR HUBER, being first duly sworn as a witness on the part of complainant, testified as follows:

Question. Give your name and residence, Mr. Huber.

Answer. Oskar Huber; Spokane, Washington.

Question. What is your profession?

Answer. Civil engineer.

Question. How long have you practiced your profession?

Answer. In the neighborhood of twelve years.

Question. Have you any specialty in that department?

Answer. Yes, sir.

Question. What is that specialty?

Answer. Hydraulic engineering.

Question. At the present time are you in that work?

Answer. Yes, sir.

Question. What is your present position?

Answer. I am chief engineer of the Spokane water works.

Question. As an engineer have you ever had any experience in examining water supplies and water plants of different cities?
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Answer. Yes, sir.

Question. What are some of the cities whose water supply you have examined?

Answer. When I was in the United States Government I examined and worked out plans for Fort — and Fort Grant. I was consulting with the Jamestown water works in Arizona also, and I was consulting engineer, employed by the chamber of commerce of Tacoma, to work out fire protection for Tacoma, four or five years ago; and then Spokane is about the limit of my experience.

Question. Have you examined the water supply of the Walla Walla Water Company?

Answer. Yes, sir.

Question. Of what does that supply consist?

Answer. Of two reservoirs and an infiltration pipe or subterranean source of supply from one spring.

Question. And did you examine the springs from which this water comes?

Answer. Yes, sir.

Question. From that examination state generally whether, in your opinion, the supply of water is sufficient for a city of the size of Walla Walla or of seven thousand people.

Answer. The supply, figuring together the two reservoirs and infiltration chamber, amounts to one million and twelve thousand gallons in twenty-four hours. And how large a population?

Question. About 7,500 people.

Answer. Well, the Pacific Coast rate is considered one hundred gallons per each person in twenty-four hours; that is considered a pretty liberal allowance.

Question. Is the rate lower in other places—that is, the general rate on the Pacific coast?

Answer. Mr. —, in his tables, says that in Eastern cities the rate is lower than on the Pacific coast. On the Pacific coast more
186 water is required than in the Eastern cities. In comparison to European cities it is much larger in this country.

Question. Did you measure the capacity of the two reservoirs and the infiltration chamber?

Answer. I measured the capacity of the sources of supply of all the springs.

Question. And that is the source of supply testified to when you say it amounts to one million and twelve thousand gallons?

Answer. Yes, sir; in twenty-four hours one million and twelve thousand gallons is available.

Question. Do you know whether or not that supply can be increased if necessary?

Answer. I would venture to say yes; I didn't make any special investigation to that effect, but I am inclined to think it is a very easy matter to do it.

Question. Can you tell whether at this season the supply of water would be greater or less than at other seasons of the year?

Answer. Well, a true spring never ought to vary. Of course, there are conditions, when you have springs in a certain locality, where you get a certain amount of surface water in it; you would find a certain amount of increase in the wet season, but it ought not to materially increase or decrease the supply of springs.

Question. Have you since being in this city familiarized yourself with the lay of the land?

Answer. Well, yes; I know the elevation.

Question. Have you made any examination as to the pressure in different parts of the city in regard to the water supply?

Answer. I did.

Question. Where was this examination or test made?

Answer. One at our office, one at Main and First, one at Main and Fourth, and one at Main and Sixth street.

Question. What was the result of those examinations?

Answer. The gauge at our office showed twenty pounds to the square inch; at Main and First, fifteen; Main and Fourth, twenty-two, and Main and Sixth, twenty-six pounds.

187 Question. Can you tell from the amounts of pressures you found at those different points of the city how high the water could be conducted by means of water pipes and connections?

Answer. Practically; yes.

Question. At the lowest pressure, at what street was that?

Answer. On Main and First.

Question. How high could the water be conducted with a pressure of fifteen pounds to the square inch with proper connections with the mains?

Answer. Thirty-four feet and six-tenths; that is up there at the corner of Main and First.

Question. Would that reach the third story of a building?

Answer. No; that wouldn't reach the third story of a building; not at that corner; there are no three-story buildings at that corner.

Question. You say there are none at that corner?

Answer. I didn't notice any; no.

Question. Would it reach the second story of a building?

Answer. Yes, sir.

Question. With ease?

Answer. Oh, yes; there would be an ample supply if the pipe through which it run was reasonably free from obstruction.

Question. If proper connections were made with the mains?

Answer. Yes, sir.

Question. Is there any general formula for ascertaining what height water would reach with a given pressure at a given point?

Answer. Yes, sir.

Question. What is it?

Answer. A gallon of water one hundred feet high will press 43.04 pounds to the square inch on the bottom.

Question. Is that a constant rule—so that a gallon of water fifty feet high would produce half that pressure?

Answer. Yes, sir.

Question. Do you know about what height the pipes which are used on the third story of an ordinary building are approximately?

188 Answer. About forty to forty-two feet. It depends, of course, on the height of the stories. Under ordinary conditions it would be about forty-two feet.

Question. State once more the pressure you found at those other places you mentioned.

Answer. At the water office, twenty pounds; Main and First street, fifteen pounds; Main and Fourth street, twenty-two pounds; Main and Sixth street, twenty-six pounds.

Question. State at those different points how high the water can be raised with proper connections, so that there will be an ample flow for all domestic purposes.

Answer. At the water office, forty-six feet; at Main and Fourth, fifty feet; at Main and Sixth, sixty feet.

Question. What was the character of the water that you found in those springs as compared with the water in other places?

Answer. It is remarkable for its clearness, in comparison with works I have had to do with before this. The water is very clear and seemed to be soft. Any object can be easily determined on the bottom of the reservoir.

Question. Did you, or could you, make any investigation as to the character of the outlets from the reservoir—the connections and pipes?

Answer. I could make an examination of it if they would be uncovered.

Question. There is no opportunity of making it?

Answer. There is no opportunity of making an examination of those things, because they are all buried.

Question. Well, why do you consider the capacity of the water works sufficient for a city of this size?

Answer. Because I made the allowance of one hundred gallons *per capita*, which, in my opinion, is sufficient, and, if you assumed that Walla Walla has a population of seventy-five hundred, it would only require 750,000 gallons *per diem*, while I found by investigation that the water available from all sources in connection
189 with this water system amounts to over one million gallons *per diem*, or rather 1,012,176 gallons *per diem*.

Cross-examination :

Question. Mr. Hubert, what is this source of supply—a spring?

Answer. The source of supply is a number of springs; yes, sir.

Question. In your judgment are they springs or subterranean channels coming from Mill creek?

Answer. That is a hard proposition to determine. That may be the case, or they may be springs running through the strata from the hills.

Question. How did you determine the capacity of the water works?

Answer. By shutting off all the outlets from the reservoirs—I am speaking now of one reservoir at a time. I shut off the overflow and under supply to the city; then I put a box in there of twenty-seven cubic feet contents, and let the water settle down first to its normal state so that the outlet don't vary from the inlet. When the water keeps its level I turn the water from this reservoir into

the box and time it with a stop-watch and figure out the amount of cubic feet discharged in a certain time.

Question. Is any portion of the water that is now discharged wasted, or does it all get into the pipes?

Answer. No; a good deal of the water is wasted.

Question. The pipes that tap that supply—what are their capacity?

Answer. The outlet from the reservoir No. 1, high pressure, is eighteen inches.

Question. Now, what is the capacity of a pipe of that size?

Answer. It depends under what pressure it is.

Question. With the pressure that is there?

Answer. Of course, you know that at the beginning of the pipe at the reservoir there is no pressure, practically.

Question. Would you be able to tell from the investigation you made how much of that 1,012,176 gallons a day the inhabitants of the city get?

190 Answer. No, sir; I couldn't tell how much the city would get.

Question. How could you tell, then, whether or not there is furnished to the city and inhabitants the 750,000 gallons a day that — the Pacific Coast ratio, with the facilities the company have?

Answer. Well, I have noticed that the water in the reservoir will lower and raise; for instance, if they consume a certain amount of water a day downtown it lowers the level of the reservoir which has a certain capacity; then it shows that the people use more than 100 gallons *per capita*. Otherwise, if they use just the same amount that all the springs furnish, the water would keep its level. If the water lowers itself, then the people use more water than 100 gallons *per capita*.

Question. As I understand you, the water in the reservoir itself raises and lowers according to the demands upon it?

Answer. Yes, sir.

Question. And from that you can determine?

Answer. Only from the changes which occur. At certain times they use four or five times the amount; sometimes almost nothing.

Question. If the outlet from the source of supply is insufficient to carry it, the inhabitants would not get that amount?

Answer. Exactly; if it wasn't sufficient.

Question. Now, you took the pressure at four hydrants or three hydrants and the water office?

Answer. Yes, and at the gauge at the water office.

Question. Is the pressure at Main and First, which you say is fifteen pounds, sufficient to successfully operate a fire-engine throwing two streams?

Answer. Well, I would go to a hydrant at a little lower elevation. Question. You wouldn't consider it sufficient for that purpose, would you?

Answer. I wouldn't consider it safe to fight a fire in a four or

five story building with a connection of only fifteen pounds pressure attached to a four-inch main.

Question. Would you consider it sufficient to fight a fire 191 in a three-story building?

Answer. I really never made any test with fifteen pounds pressure in a fire-steamer.

Question. As I understand, you are a hydraulic engineer, and know these things theoretically and not practically?

Answer. Yes.

Question. Theoretically, what pressure is required on a four-inch main to enable an engine to throw two ample streams with an inch and a quarter nozzle?

Answer. To throw two streams to the third story of a building?

Question. Yes.

Answer. Well, I would say twenty-two to twenty-five pounds pressure.

Question. Do you know in the construction of water works for fire purposes what pressure is considered the minimum pressure for that purpose—what pressure in the engine?

Answer. You see, it depends so much on the main from which the water is derived.

Question. A four-inch main is included in my question.

Answer. Well, I would consider that twenty-five pounds would be sufficient to throw an ample stream of water.

Question. Well, an ample stream of water does not answer the same purpose for the extinguishment of fires as two—not so ample.

Answer. In a five or six story building, you know, that would be out of the question. If you use two hose, with two nozzles, you never would think of attaching to a four-inch main under a pressure of fifteen pounds; the conditions here are not that way,

Question. That is to say, from a four-inch main, where the pressure is only fifteen pounds, you wouldn't think of using two streams from the engine, would you?

Answer. Oh, I might experiment with it.

Question. As a practical man?

Answer. If I had nowhere else to go I think I would connect.

192 Question. If you had nowhere else to go, would you use one stream or two?

Answer. I would use one.

Question. So that with a fifteen pounds pressure you could only get about one-half the capacity of the engine?

Answer. No; that don't necessarily follow.

Question. In other words, you would be able to use only one stream?

Answer. I can't say that.

Question. In fighting fire I will ask you if it isn't absolutely necessary for successful fighting to have two streams coming from different directions.

Answer. Yes, sir.

Question. And with this fifteen pounds pressure you couldn't get these two streams?

Answer. No; I would connect with another hydrant and another steamer.

Question. Suppose the other hydrant connects with the same main, you wouldn't gain anything there, would you?

Answer. No.

Question. Now, supposing there was no pressure on the hydrant—that the water in the hydrant only rose to the top of the hydrant, or did not even do that—you couldn't use two streams, could you?

Answer. No, sir.

Question. Could you use one successfully?

Answer. No, sir. If I understand you, you mean absolutely no pressure, but simply the mains would run over the top of the hydrant.

Question. Yes; just raise to the top of the hydrant and run out.

Answer. It would suck the main dry and create a vacuum.

Question. You haven't examined any hydrants except those three for the pressure?

Answer. No; just those.

Question. What did you use in determining this pressure?

Answer. A gauge.

193 Question. The gauge which the water company uses?

Answer. I didn't get it from the water company. I got it from the plumber on First street, or some street there.

Question. Now, here is one thing I don't quite understand: You say that the supply of water could be increased?

Answer. Yes, sir.

Question. In what way could you increase the supply?

Answer. By digging infiltration chambers or subterranean channels. I believe that the surrounding locality there is full of springs.

Question. You could increase the supply if there are other springs there?

Answer. I am quite sure there are other springs there.

Question. That you have determined from the formation there and the appearance of the ground?

Answer. From the appearance of the ground; yes.

Question. Now, in determining the number of feet that water would rise under a given pressure, you took into account the friction on the pipes?

Answer. I did not.

Question. How much should be deducted for that?

Answer. It is conditional; it depends on the nature of the pipe.

Question. And it would vary, I presume, as the pipe grew older, wouldn't it, and rusty?

Answer. I have seen pipe uncovered and examined it after four-teen or sixteen years in the ground, and it didn't show any signs of rust. Then there are pipes that won't get that way.

Question. Taking into consideration the friction and assuming that the water is conveyed in a building or otherwise in new pipes

such as are ordinarily used for water, how much should be deducted for friction?

Answer. When I measured the *guage* on those different streets there they showed an actual efficiency of 22, 20, and 26 194 pounds respectively—that is, the actual efficiency. You would only have to deduct for friction from the point of service to the house, which would be very little.

Question. That is, you would have to deduct for friction from the main up into the second or third story of the building?

Answer. Yes, sir; we would calculate for a loss from the highest elevation down to the hydrant point.

Question. Deducting that little amount of friction, the water would raise in the building to the height you have stated, would it?

Answer. Yes, sir; that friction would be deducted from that point to the second or third story of a building. It would be very trifling, especially in a clean pipe.

Question. How many cubic inches per minute did you find the North reservoir supplied?

Answer. Is that the high-pressure one?

Question. How do you distinguish the two reservoirs?

Answer. Low and high pressure.

Question. Give each of them.

Answer. The North reservoir has 380,376 gallons in 24 hours—that is, the high-pressure one. I gave you the wrong number. The low-pressure is the North reservoir; that has 583,200 gallons.

Question. That is the North reservoir?

Answer. Yes; and the other one is the South, which has 380,376 gallons, and the infiltration pipe has 48,600 gallons.

Question. That you determined by finding the number of cubic feet that were discharged in a minute or some given time.

Answer. In a given time filling a cube of 27 cubic feet.

Question. Now, how many cubic feet per minute did you find that each of those discharged?

Answer. I would have to reduce them back—divide it.

Redirect examination:

Question. The pressure of fifteen pounds is the lowest pressure of any you have examined?

195 Answer. Yes, sir.

Question. When you spoke about it being difficult for an engine to throw two streams of water from a hydrant, that means if you were connected with a main of four inches diameter?

Answer. Yes, sir.

Question. What would be the result of a six or eight inch main?

Answer. The result of a larger main would be, the engine can run to a greater amount of pressure without exhausting the main.

Question. Are there any three-story buildings in the neighborhood of that point where you found a pressure of fifteen pounds to the square inch?

Answer. I didn't notice any. It seems to me I saw a two-story building.

Question. When you spoke about these streams, about it being difficult to use these streams, you meant on a three-story building, did you not?

Answer. Do you mean from the fire-engine?

Question. Yes.

Answer. I can't say as to that, that a stream under only fifteen pounds pressure from a four-inch main would be sufficient.

Question. Do you know as a matter of fact whether it would or would not be? Have you made any tests of that sort in fire-engines?

Answer. I have in connection with the Spokane fire department, but not under the peculiar conditions mentioned.

Question. Do you know the size of the outlets of the engines of the Spokane fire department as compared with the outlets of the Walla Walla fire-engines?

Answer. The nozzles—the size of those?

Question. Yes; where the connection is made.

Answer. I don't know the size of the nozzles used here; I know the size of the nozzles used in Spokane.

Question. Wouldn't the size of the nozzles vary the case somewhat?

Answer. Most decidedly.

196 Question. Your attention was directed to the size of the nozzles?

Answer. The size of the nozzle there is inch and a half.

Question. With a smaller nozzle you say the streams could be carried more easily by the engine?

Answer. Yes, sir; it depends on the amount of water you want to throw on the fire.

Question. Do you know the size of the mains in any of these streets?

Answer. No; of course, they are all covered. I could not swear to any of the sizes except from the map they have here.

Question. Do you know the size of the mains which conduct the water from the two reservoirs and from the infiltration chamber?

Answer. Yes, sir.

Question. One is twenty inches, the other 18, and the other 12, is it not?

Answer. Yes, sir.

Question. Wouldn't those three outlets be sufficient to carry 750,000 gallons of water in twenty-four hours from the two reservoirs and infiltration chamber?

Answer. Most assuredly, without any question.

Recross-examination:

Question. I want you to give me, if you please, the height that water will raise at five pounds pressure and at eight pounds pressure.

Answer. Eleven and one-half feet at five pounds pressure, and eighteen and four-hundredths at eight pounds pressure.

Question. The nozzle used upon the hose of ordinary steam fire-engines is an inch and inch and a quarter, is it not?

Answer. For ordinary use it is; I think about inch and a half is used in some cities, and two inches is used for water powers, but not in connection with the ordinary steamer.

197 Question. Now, even though you have a six-inch main and low pressure as fifteen pounds, could you successfully operate your engine with two streams—from a six-inch main with fifteen pounds pressure?

Answer. It depends on how far you want to throw the water and how much. If you want to put on a small nozzle you can do it, but the larger your nozzle is, the more water you will exhaust from your six-inch main, especially if you keep up the same number of pounds of steam.

Question. As a practical matter, you want to throw all the water you can, don't you?

Answer. If you want to throw in the walls.

Question. And if you don't have pressure enough to force water into the engine you lose power in drawing the water from the main?

Answer. No, that don't necessarily follow. All that you need is a sufficient supply which flows into your engine. In other words, it don't make any difference what pressure the water flows into your engine as long as you don't exhaust your supply and empty your fire-main.

Question. If there is a sufficient amount, it don't make any difference?

Answer. No.

Question. And if there is not a sufficient amount, it doesn't fill into your engine?

Answer. Then you create a vacuum and your engine sucks air.

(Witness excused.)

OSKAR HUBER, being recalled as a witness on the part of complainant, testified as follows:

Question. Mr. Huber, did you make any test of the pressure which the sort of pipe given you by Mr. Bowman would stand?

Answer. Yes, sir.

Question. Did you measure that pressure, did you say?

Answer. Yes, sir.

Question. What was it?

198 Answer. Fifty-five pounds. We only run it to about fifty-five pounds and then the plug with which the pipe was stopped blew out.

Question. What was your test?

Answer. It was a hydraulic test. The pipe was filled by means of a hose from the city-supply pipe, and as soon as it was filled we used a hand pump and pumped until we got fifty-five pounds pressure, when we couldn't go any further by reason of one of the plugs blowing out.

Question. The two ends of the pipe you used were closed with a plug?

Answer. Both ends were closed with plugs and sheet le-d laid in the cracks to a certain extent.

Cross-examination :

Question. This rate of one hundred gallons per day includes water for irrigation, does it?

Answer. Yes, sir. Of course, it don't include water for irrigation all over the counftry, but for sprinkling lawns.

Question. It includes what is necessary for irrigation in the city?

Answer. Yes; in the city limits.

(Witness excused.)

F. M. BOWMAN, being recalled as a witness on the part of complainant, testified as follows :

Question. You heard Mr. Huber's testimony which he just gave?

Answer. Yes, sir.

Question. Do you remember of handing him this pipe to use to make a test?

Answer. Yes, sir.

Question. What pipe was this?

Answer. An eight-inch steel-riveted pipe.

Question. Is that a sample of any pipe used by you in the city of Walla Walla for water purposes?

Answer. Yes, sir; it was used on Main street.

199 Question. How does this pipe compare in strength with other pipes used for the mains in the city of Walla Walla?

Answer. Well, it is not as good pipe as the balance of pipe that has been laid. It is the poorest lot of pipe that has been laid for strength and heft.

Question. This, then, was the weakest of any of the pipe used by you for the mains in the city of Walla Walla?

Answer. Yes, sir; in the town proper. Of course, the pipes at the head were a little lighter than that.

Question. At the head of the reservoir?

Answer. Yes, sir; a few joints.

(Witness excused.)

(Signed)

F. M. BOWMAN.

Complainant here rests his case.

H. P. ISAACS, being first duly sworn as a witness on the part of defendant-, testified as follows :

Question. Your full name is H. P. Isaacs?

Answer. Henry P. Isaacs.

Question. Where do you reside, Mr. Isaacs?

Answer. In Walla Walla city.

Question. How long have you resided there?

Answer. Thirty years.

Question. Are you acquainted with the water system now owned by the Walla Walla Water Company?

Answer. Yes.

Question. By whom was that system constructed or inaugurated?

Answer. By my brother, J. C. Isaacs.

Question. Were you familiar with the system during the time he owned it?

Answer. Yes.

Question. When did he transfer that system to the Walla Walla Water Company?

Answer. I don't recollect the exact date.

200 Question. With reference to the time that the ordinance was passed and contract made in controversy in this suit?

Answer. There was one contract made by him some time when he had it, but I don't recollect what time; but the contract with the present water company was made after the transfer.

Question. About 1887?

Answer. About that time.

Question. Do you know, approximately, how much had been invested in that plant at the time it was turned over to the Walla Walla Water Company?

Answer. About thirty-five thousand dollars.

Question. You reside in the city limits of the city of Walla Walla?

Answer. Yes.

Question. At what point?

Answer. About a quarter of a mile this side or west of the east boundary of the city.

Question. State whether there is any water service to your place or to your neighbors from the present system of the Walla Walla Water Company.

Answer. No.

Cross-examination:

Question. In what addition do you reside, Mr. Isaacs?

Answer. I suppose it would be termed the Isaacs addition. It is not platted; not all; part of it has.

Question. Is it acre property entirely?

Answer. Not entirely. There is a portion extending to the eastern line and on the south side of it, along Alder street.

Question. When was this district included in the city limits?

Answer. It is a matter of record. I don't recollect.

Question. Have you any idea when it was?

Answer. Not definitely, sir. It is just a matter of record.

Question. You haven't any idea at all?

201 Answer. Yes, I have some idea. It was between 1875 and 1887.

Question. How long have you resided there, Mr. Isaacs?

Answer. Thirty years.

Question. In that same place?

Answer. In this same place.

Question. Have you ever made any application to this company for water supply?

Answer. No, sir; it would have been useless.

Question. So you never have made application?

Answer. It would be impossible to get it.

Question. I say you never have made application.

Answer. No, sir; I have never made any application.

Question. How thickly settled is your neighborhood?

Answer. What do you mean by neighborhood, sir?

Question. Well, this district which you say is not supplied with water.

Answer. There are half a dozen houses on it.

Question. What is your business, sir?

Answer. Miller.

Question. Where is your mill?

Answer. Just outside of the city limits, east.

Question. How far from your house?

Answer. Three or four hundred yards.

Question. You say your brother was the former owner of this water plant?

Answer. Yes, sir.

Question. Is your brother dead?

Answer. No, sir.

Question. Is he a resident of Walla Walla?

Answer. He is.

Question. Did you ever own any interest in the water plant?

Answer. I had one or two shares.

Question. At what time?

Answer. At the organization of the company.

202 Question. Do you remember when that was; was it about 1881?

Answer. I don't recollect exactly.

Question. When did you sell your interest?

Answer. When it was transferred.

Question. To what company; to the present company?

Answer. No; I sold to my brother.

Question. At what time?

Answer. When the transfer was made.

Question. Did you ever take a very active interest in the affairs of the company?

Answer. I was president and manager of it.

Question. Were you paid a salary as president?

Answer. No; I was not.

Question. How much did you value these shares at?

Answer. Before the affair was sold?

Question. Yes.

Answer. Well, I don't recollect.

Question. Did your brother make you a present of the two shares?

Answer. Yes.

Question. Well, as a matter of fact, he was the manager of it himself, was he not?

Answer. He was.

Question. It was considered his property?

Answer. There were several others had an interest in it. I don't recollect now who they were.

Question. Have you a very good memory?

Answer. Ordinarily good; not as good as it has been.

Question. It is not very good?

Answer. I didn't say that; it is not as good as it has been.

Question. Was it good at any time?

Answer. Yes; it was pretty good.

Question. You don't remember when the city limits were extended to include your addition?

Answer. No; it will show on the city records.

203 Question. Now, how do you recollect how much money was invested in the water company?

Answer. My way of recollecting that was, it was somewhat less than it sold for.

Question. Somewhat less than it sold for?

Answer. Yes; it was less than the sale was made for.

Question. Can you now remember the different details of expense and expenditures on the plant?

Answer. No; because I didn't pay much attention to the books nor representations made.

Question. You have no recollection of the expenditures?

Answer. No, sir; not definitely.

Question. Have you any prejudice against the water company?

Answer. Not particularly.

Question. What do you mean by not particularly?

Answer. I can't recollect anything definite.

Question. What indefinite prejudice can you recollect?

Answer. I think the prejudice was against one Mr. Eastman, who is now dead.

Question. What was the cause of that prejudice?

Answer. Well, he acted ungentlemanly and in an unbusiness-like manner.

Question. Do you think he beat you out of property?

Answer. No, sir.

(This testimony was here objected to by counsel for defendant on the ground that it is not proper cross-examination.)

Question. What do you mean by ungentlemanly manner?

Answer. He didn't do as he agreed.

Question. On a contract?

Answer. Yes.

Question. Do you mean the written contract didn't conform to the verbal agreement?

Answer. It was in the matter of property, or something of that kind.

204 Question. As a matter of fact, didn't you think he got the property for less than it was worth?

Answer. He got it for less than it was valued at afterwards.

Question. Wasn't that the foundation of your prejudice?

Answer. No, sir.

Redirect examination :

Question. You stated, Mr. Isaacs, that it would be useless to apply to the water company for a supply of water. Why?

Answer. The level of their water wouldn't bring it to my house.

Question. Your house is on a higher altitude than the reservoir?

Answer. Probably lower, but the water wouldn't raise that high. I would very gladly use the water if I could get it.

Question. Your house is on a higher altitude than the reservoir?

Answer. Yes, sir.

Question. And that is also true of the neighborhood where you live?

Answer. It is.

(Witness excused.)

(Signed)

H. P. ISAACS.

J. F. BOWMAN, being first duly sworn as a witness on the part of defendant-, testified as follows :

Question. What is your full name?

Answer. Jerome Franklin Bowman.

Question. Where do you reside, Mr. Bowman?

Answer. In Walla Walla.

Question. How long have you resided there?

Answer. Fourteen years or a little over.

Question. Do you know the complainant in this case, The Walla Walla Water Company?

Answer. Yes, sir; I do.

Question. Have you ever been in their employ?

Answer. Yes, sir.

205 Question. In what capacity?

Answer. As superintendent.

Question. Are you familiar with the plant of the Walla Walla Water Company, its pipes, reservoirs, and other appliances?

Answer. Yes, sir.

Question. I will ask you to look at that map and tell me whether or not it is a correct map of the city of Walla Walla, with its various additions.

Answer. Do you want me to testify as to the correctness of this map?

Question. Whether it is substantially a correct map.

Answer. It is the one we go by.

Question. The one that the water company goes by?

Answer. Yes, sir; a similar one; the same make of map—a lithograph.

Question. Now, you notice this map has red lines upon it, through various streets. What do they represent?

Answer. Those red lines represent pipe lines laid in the city of Walla Walla.

Question. Laid by the Walla Walla Water Company?

Answer. Yes, sir.

Question. I will ask you if those red lines represent correctly the mains of the Walla Walla Water Company.

Answer. Yes, sir.

Question. Now, I will ask you if those mains are marked in any way so as to determine their character and size.

Answer. The size of the pipes are all marked on those lines.

Question. And is the character of the pipe also marked?

Answer. Yes, sir.

Question. Now, will you explain, please, how they are marked?

Answer. Well, the marking for each make of pipe is marked on the lines of each line of pipe. K. stands for Kalamime, R. for riveted, M. for Matthewson.

Question. Do those three kinds of pipe include all the 206 pipe in the plant of the Walla Walla Water Company?

Answer. Yes, sir; there is one stretch goes down to the penitentiary, on Elm street, that is marked "screw joint." That is a lap-weld screwed pipe.

Question. You were familiar with this pipe in 1887?

Answer. Yes, sir.

Question. How many laterals and mains had they at that time?

Answer. I don't recollect clearly. I think about fifteen miles. Between fifteen and sixteen miles in 1887.

Question. How many have they now?

Answer. Between nineteen and twenty miles.

Question. Now, have you made an estimate of the number of feet of each kind of pipe that are now in the plant and of the number of feet that have been put in since 1887.

Answer. No, sir.

Question. Did you ever make any estimate of that amount for Mr. Roberts?

Answer. I measured it off for him and he put down the amount in figures.

Question. You measured off the number of feet of each kind of pipe?

Answer. Yes. What the result was I don't know.

Question. You stated that you measured it correctly?

Answer. Yes, sir.

Question. Do you know whether any two-inch mains have been laid in the streets of Walla Walla and added to the plant of the Walla Walla Water Company since the organization of the company—since 1887?

Answer. Not to my knowledge; no, sir.

Question. You have no knowledge of any two-inch mains being laid and added to the plant?

Answer. Yes; two-inch mains have been laid by private consumers and attached to the company's mains.

Question. To whom do they now belong—to the company or to the private consumers?

207 Answer. To the company, when the company earns them.

Question. Explain the system adopted by the company while you were superintendent with reference to the laying of mains to supply private consumers—these two-inch mains.

Answer. Wherever there is a party living off from the main line who wishes water, they could get water by applying to the company. They first get the consent of the company, then laying the pipe down to their premises, getting any plumber in town to do the work for them, shutting off the water to make connection. When that is done the company gives a receipt for so much paid down, to be taken out at the regular rate in water.

Question. As I understand you, they are compelled to lay the pipe themselves, pay for it, and the company would credit them for that amount, to be paid in water?

Answer. Yes; to be taken up in water; that is right.

Question. Then the company would own the pipe?

Answer. After it is taken up; yes, sir.

Question. Has that been the invariable rule?

Answer. Since 1887—yes, sir; so far as my knowledge goes it has.

Question. Do you know about how much of the mains have been laid that way—about how many feet?

Answer. I cannot say. I have kept no track of it.

Question. I will ask you what was the course and rule of the company with reference to shutting off water where persons use it over hours in irrigating.

Answer. Well, when the company had their irrigation hours whenever consumers used water over these hours they were shut off. We had a man hired for that purpose, and he was instructed to shut off the water if it was used over hours.

Question. Without notice?

Answer. No, sir; they always got notice once or twice and then they were shut off. Those were the instructions given to the man who was employed for that purpose.

208 Question. Now, Mr. Bowman, do you know the different sizes of pipes—the twenty-inch, sixteen-inch, twelve-inch, ten-inch, nine-inch, eight-inch, six-inch, four-inch, three-inch, two and a half inch, and inch and a quarter?

Answer. Yes, sir.

Question. How is Kalamime pipe and Matthewson pipe measured—by its external or internal diameter?

Answer. By outside diameter.

Question. What is the thickness of the Kalamime pipe?

Answer. It is three-sixteenths, I believe.

Question. And of the Matthewson?

Answer. It is about the same.

Cross-examination :

Question. Were you subpoenaed in this case, Mr. Bowman ?

Answer. I was today, just about fifteen minutes ago.

Question. Did you make a request to be subpoenaed ?

Answer. No, sir.

Question. You did not ?

Answer. No, sir.

Question. Have you any interest in this case ?

Answer. Not at all.

Question. Have you not the slightest interest on one side or the other ?

Answer. No, sir.

Question. You don't care who wins the case ?

Answer. Not particularly ; no, sir.

Question. You have no preference whatever ?

Answer. No, sir.

Question. Who is Mr. Roberts ?

Answer. He is at present mayor of the city.

Question. What were the different measurements of pipe you gave Mr. Roberts ?

Answer. That wasn't mentioned. He called for a list, and I copied off for Mr. Roberts the pipe lines on this plat.

209 Question. You were paid for that ?

Answer. Yes.

Question. How much ?

Answer. Five dollars.

Question. For measuring that pipe off for Mr. Roberts ?

Answer. For making this plat for Mr. Roberts.

Question. Were you paid anything for measuring the pipe ?

Answer. It was all done at the same time.

Question. Was that a part of the contract ?

Answer. Yes, sir.

Question. Or was that simply thrown in by you ?

Answer. It was a part of the contract. He hired me to make the map for him.

Question. And you were to measure the pipe for him ?

Answer. Yes, sir.

Question. You say that in 1887 there was about fifteen miles of pipe in the plant of the Walla Walla Water Company ?

Answer. About that ; yes, sir.

Question. How long before that time were you superintendent of the water company ?

Answer. Since 1880.

Question. Were you superintendent of the company when all of the pipe was laid ?

Answer. Which—of this city ?

Question. Yes.

Answer. No, sir. I was when most of them were laid.

Question. How much of it was laid before you were superintendent ; have you any idea ?

Answer. Oh, there was about three miles; two and a half or three miles, I should judge.

Question. During the first year that you were superintendent do you remember how many miles of pipe were laid?

Answer. No, sir. I remember they dug the old up and laid new.

Question. How much was laid during each succeeding year since 1887?

210 Answer. I couldn't tell without referring to my book.

Question. When you stated that there was fifteen miles of pipe, was that from your recollection or from your books?

Answer. From recollection.

Question. Can you tell us the exact number of miles of pipe by consulting your books?

Answer. I can.

Question. Your recollection, then, is more accurate than the record on your books as to this point?

Answer. No, sir; it never was.

Question. Do you remember this contract that was entered into between the city and the water company in 1887?

Answer. Yes, sir.

Question. Do you remember how many miles of pipe were laid in the year 1887?

Answer. In 1887 I should judge about two miles or two and a half; something like that. There was a string laid down to the penitentiary.

Question. Are you speaking about new mains or those taking the place of old ones?

Answer. No; in 1887 we didn't lay only the pipe to the penitentiary. The balance was replacing old mains.

Question. From 1887 up to the time you left the company were you always present when these mains were laid?

Answer. Yes, sir.

Question. On all occasions?

Answer. Yes, sir.

Question. Who laid the mains?

Answer. My brother done the work.

Question. He would know, then, as well as yourself the number of miles of pipe that were laid?

Answer. I don't think he would; it wasn't his business. He wouldn't charge his memory with that.

Question. He actually laid all the pipes on the different streets, though?

211 Answer. No, sir; not all.

Question. Have you any entries taken during the time you were superintendent from which you refreshed your memory as to the number of miles of pipe that have been laid in the various streets of the city since you were superintendent?

Answer. Only this map; this is the first map I ever made off from it.

Question. Did you make that map?

Answer. I lined this map.

Question. Those red marks and that 12, 7, etc., were not entered by the maker of that map?

Answer. No, sir; I added that.

Question. From books or from your recollection?

Answer. From my recollection.

Question. Do they include the alterations from pipes that—already been laid down or only entirely new pipes?

Answer. All the pipes laid in the city of Walla Walla.

Question. It includes, then, the pipes and mains that had been laid prior to the time of this contract as well as since then?

Answer. Yes, sir.

Question. You have made no attempt to segregate the pipe and mains laid prior to 1887 from those that were laid after 1887?

Answer. No, sir; I have made no attempt to segregate those.

Question. When you say there were fifteen miles of pipe laid in the city prior to 1887 and now there are twenty miles, that is simply a mistake?

Answer. I said there were about fifteen miles up to 1887.

Question. How did you reach that conclusion; did you expect to be asked that question?

Answer. No, sir; I reached that conclusion from running over this map.

Question. With a view of being examined?

Answer. I didn't know I was going to be examined. I wasn't subpoenaed until about half an hour ago.

212 Question. When you drew those lines on this map it was not for the purpose of determining the number of miles of pipe laid prior to 1887 and afterwards?

Answer. Mr. Roberts asked me how many miles were laid, and I gave him as near as I could the number of miles of pipe laid up to 1887, and also the pipe that had been laid since, but it was not segregated from pipe that replaced old or smaller pipe.

Question. I will ask you with reference to the kind of pipe that was laid prior to 1887.

Answer. It was mostly all riveted pipe.

Question. Was that sheet-iron pipe?

Answer. Yes, sir.

Question. Is that the poorest quality of pipe?

Answer. Not always.

Question. That is, in this city?

Answer. Yes, sir; it is the poorest of any that is laid in our streets now.

Question. Has most of that pipe been replaced?

Answer. No, sir.

Question. About what proportion of it has?

Answer. There hasn't any of the riveted pipe been replaced.

Question. What kind of pipe has been replaced?

Answer. The smaller pipe; the inch and a half and two-inch has been replaced by six-inch pipe.

Question. How many miles of two-inch pipe were there laid prior to 1887?

Answer. I can't answer that question without figuring it up.

Question. You can give as definite an answer to that question as to the former question of how many miles of piping were laid prior to that year?

Answer. No, sir.

Question. Why not?

Answer. Because that included all piping.

Question. You laid that pipe?

213 Answer. I was present as superintendent.

Question. It was all done under your supervision?

Answer. Yes, sir; but to keep every size in my head would be impossible.

Question. Are you pretty confident that there were fifteen miles of pipe laid prior to 1887?

Answer. Yes, sir.

Question. Can't you give any idea at all as to how many miles of two-inch pipe were laid?

Answer. No, sir.

Question. Don't you know that most of the two-inch mains were replaced?

Answer. Not most of them.

Question. Your duty as superintendent of the water works was to make suggestions as to where pipes should be laid and when replaced and as to the quality of pipe that should replace them?

Answer. Not as to the quality, but when and where they should be laid.

Question. That is a part of your business?

Answer. Yes, sir.

Question. You always perform your duty to the best of your ability?

Answer. Those matters were left with the directors or president. I just suggested them to him, and he took it under advisement, and sometimes they would act on my suggestion and sometimes they would not.

Question. I say you generally performed your duties to the best of your ability?

Answer. Yes, sir.

Question. You only made suggestions that you thought were proper?

Answer. Yes, sir.

Question. You say that your suggestions were not followed by the directors?

214 Answer. Not at all times.

Question. Well, as a general rule they were, were they not?

Answer. As a general rule they were; yes.

Question. With reference to laying of new pipe and the extension of mains?

Answer. If it paid for the investment, they always adopted it.

Question. As a practical proposition, however, did they not generally adopt all of your suggestions?

Answer. No, sir.

Question. Generally, I say.

Answer. Generally, yes; but not all.

Question. In what instances did they not adopt your suggestion?

Answer. I can't call to memory now any special case, but they did not in several cases.

Question. What extensions did you recommend that were not adopted by the company?

(This question was objected to by counsel for defendant on the ground that it was not proper cross-examination.)

Answer. One instance was, I suggested in 1890 that there should be a main on Second street, and they didn't adopt it on account of not being consumers enough.

Question. Your suggestion has since been adopted?

Answer. Yes, sir.

Question. When was it done?

Answer. In 1892. The extension on Chestnut street I also suggested, but it was not adopted at that time, but has been adopted since that time.

Question. When you made suggestions as to pipes being replaced were your suggestions followed?

Answer. Yes, sir; most of those pipes were replaced under Mr. Eastman's administration.

Question. I understand that since Mr. Eastman's administration the old pipes have been replaced by new ones on the various streets, and where there were two-inch pipes are now four-inch pipes?

215 Answer. No, sir; I have no recollection of any such improvements being made.

Question. When were those improvements made?

Answer. Under Mr. Eastman's administration.

Question. What do you call Mr. Eastman's administration?

Answer. Before Mr. Eastman died.

Question. When did Mr. Eastman die?

Answer. I think it was in 1892.

Question. After the year 1887?

Answer. Oh, yes; all the improvements in the way of enlargement of mains has been since 1887.

Question. Describe in general terms what pipes have been replaced.

Answer. We run a six-inch pipe down Alder street to Sixth, which took the place of a two-inch main, and one down Birch street—a six-inch pipe.

Question. Will you consult the map and give us other extensions?

Answer. There has been a new main coming down Alder street from the reservoir—a twenty-inch main.

Question. Now, what was the cause of all of these improvements; do you know?

Answer. The cause was for the purpose of giving consumers more water.

Question. Did that become a necessity on account of the growth of the city?

Answer. Yes, sir; on account of the demand.

Question. Wasn't it the practice to lay down new mains and, if necessary, to replace the old and small ones with larger and new ones whenever any particular district in the city rapidly increased in size and there became a growing demand for an extension?

Answer. Yes.

Question. You saw to that yourself as superintendent? You knew that was required and saw it was done?

Answer. I always called the fact to the company's attention, that they were laying too small pipes—too small for
216 twenty-five thousand population.

Question. You say you saw that the four-inch pipes were laid?

Answer. I didn't say anything of the kind. The company directed to lay four-inch pipes.

Question. And they did it?

Answer. Yes.

Question. Whenever any particular district of the city would rapidly grow up and there would be a need and demand for water, the extensions were made, were they not, to those places?

Answer. The extensions were made whenever the directors and president thought it would pay them.

Question. In other words, wherever it could reasonably be expected that water should be supplied?

(Question not answered.)

Question. Now, when you went in as superintendent and up to 1887 was there not in all the districts in this city an insufficient supply of water, and in many districts no supply at all?

Answer. Yes; in a great many.

Question. Where were those districts?

Answer. They were outlying districts.

Question. What part of the city was sufficiently supplied with water?

Answer. A good portion of the residents were supplied.

Question. Question. Well, since then what general improvements have been made? Are not nearly all of the outlying districts now supplied with water?

Answer. Most all of them.

Question. Nearly all of them?

Answer. Nearly all.

Question. Are most of those districts pretty well inhabited?

Answer. Yes, sir.

Question. The supply is ample therein for all domestic purposes, to the best of your knowledge?

Answer. No, sir; we had a great many complaints.

217 Question. I am not asking in regard to complaints.

Answer. That is the only evidence I had.

Question. That is all you know about the supply being insufficient in any case; in certain cases complaints have been made?

Answer. Only what I hear from consumers.

Question. In what part of the town do you live?

Answer. Over on Chestnut street at the present time.

Redirect examination :

Question. I will ask you, Mr. Bowman, if you know of your own knowledge of an insufficient water supply in the city.

Answer. Yes, sir.

Question. State what you know about it.

Question. I was at the head last summer; that is my knowledge of it.

Question. What is the fact about an insufficient supply there?

Answer. We were running very close; had very low water all through the summer.

Question. Were complaints coming in from various parts of the city?

Answer. Yes, sir.

Question. Did you investigate those complaints?

Answer. Some of them.

Question. What facts did you find on examination?

Answer. The water was run from a good many people in their houses. In some places they didn't have any at all. They could only get it at odd times. When the consumers had shut down irrigation the water rises, and they could get it.

Question. During irrigation hours the water wouldn't run in the faucets in their houses?

Answer. Close to the head that is the case.

Question. Was that in the season of 1893?

Answer. Yes; in 1893.

Question. Concerning the present season, was the water supply unusually good this season?

Answer. It was better than last year and year before.

218 Question. It has been a wet season, hasn't it?

Answer. Yes; a pretty wet season.

Question. How about 1892?

Answer. It was dry also. They had a great deal of trouble in 1892 up to the time when they put in a larger main. They didn't have much trouble in this portion of the city.

Question. How about the other portions?

Answer. They have always had trouble with other portions of the town.

Question. Has this trouble about insufficient water supply ever been reported to the board of directors?

Answer. Yes, sir.

Question. What action did they take upon it?

Answer. There wasn't any to my knowledge.

Question. Do you know anything about the books that were kept by the corporation prior to the time that Mr. Turner became secretary?

Answer. No, sir; I had nothing to do with the books whatever. Mr. Winans was their secretary previous to Mr. Turner. I had nothing to do with it.

Recross-examination :

Question. Are you friendly with the company?

Answer. Not to all of them; no, sir; I am not.

Question. You have a feeling against them?

Answer. A portion of them, I said.

Question. I mean to the company, the Walla Walla Water Company, as a corporation.

Answer. As a corporation my feelings are the same as for other corporations. I have feeling against them.

Question. What do you mean when you say up to the head?

Answer. Right at the reservoir. I mean the reservoir itself.

Redirect examination :

Question. You mean the reservoir at times wasn't sufficiently supplied with water?

219 Answer. The reservoir at times had a very heavy drain, and the water run down in it in a very short time.

Question. If at such times there had been a fire, when there was a heavy drain of water from the reservoir, could they have stopped it?

Answer. Not in any reasonable length of time without shutting off a portion of the city. That was my calculation, to shut off a portion of the city in case of a fire.

Question. If there had been a fire, you would have been obliged to shut off the water from a portion of the city?

Answer. That was my calculation. I intended to do it.

(Witness excused.)

(Signed)

J. F. BOWMAN.

JOHN L. ROBERTS, being first duly sworn as a witness on the part of defendant- testified as follows:

Question. What is your full name?

Answer. John L. Roberts.

Question. You are a resident of Walla Walla?

Answer. I am.

Question. You are a taxpayer in Walla Walla city?

Answer. I am.

Question. What official position do you hold, if any?

Answer. I am mayor of the city.

Question. What is your business, Mr. Roberts?

Answer. At the present time?

Question. Yes.

Answer. Foundryman.

Question. How long have you been engaged in the business of manufacturing from iron?

Answer. I have been engaged in the iron business since 1859.

Question. Are you familiar with iron pipe?

Answer. Somewhat.

Question. Of the cost and value?

Answer. Yes.

220 Question. Now, did Mr. Bowman, at your request, make this map?

Answer. He did.

(Counsel for defendant- here offered in evidence the map, which was marked Defendants' Exhibit "A.")

Question. Did Mr. Bowman, at your request, give you the number of feet of the various kinds of pipe laid by the Walla Walla Water Company since 1887, and the number of feet of the various kinds of pipe now in the system?

Answer. He did.

Question. Did you make a memorandum of what he gave you?

Answer. I did.

Question. I will ask you if that is the memorandum.

Answer. That is a copy of the original. I have got the original in my pocket.

Question. Just take the original.

Answer. Of course it is, in a crude manner.

Question. You can use it for reference.

(COUNSEL FOR COMPLAINANT: I object to the witness refreshing his memory or making use of the memorandum for any purpose in giving this testimony.)

Question. I will ask you, Did you take the amounts, sizes, and character of the pipe correctly as he gave them?

Answer. I did.

Question. Now, I wish you would state first the total amount of the various kinds and sizes of pipe now in the plant of the Walla Walla Water Company as given you by Mr. Bowman and as you recorded it.

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial, and also on the ground that such testimony would be hearsay.)

Answer. 1,100 feet of 20-inch riveted pipe, 3,880 of 16-inch riveted, 1,200 of 12-inch riveted, 3,700 of 10-inch riveted, 1,000 of 9-inch riveted, 4,900 of 8-inch riveted, 3,250 of 6-inch riveted, 12,800 feet of 4-inch riveted. That is exclusive of the penitentiary line, 221 is my understanding. 3,900 feet of 6-inch riveted, penitentiary line; 2,600 feet of 4-inch riveted, 8,300 feet of 6-inch Kalamime, 3,900 feet of 4-inch Kalamime, 1,400 feet of 6-inch Matthewson, 9,425 feet of 4-inch Matthewson, 2,300 feet of 4-inch lap-weld pipe, screwed joint; 1,700 feet of 3-inch lap-weld, 21,600 feet of 2-inch and 4,600 feet of 1½-inch lap-weld, and 6,800 feet of 1¼ lap-weld supply pipe to the reservoir; 400 feet of 9-inch riveted, 1,200 feet of 10-inch; 1,200 feet of ditching to one reservoir and 1,300 feet of another ditch. That is all the pipe except the stand pipes.

Question. How much of that has been laid of the various kinds since 1887?

Answer. 1,100 feet of 20-inch.

(COUNSEL FOR COMPLAINANT: I object to that question as incompetent, irrelevant, and immaterial, and I object also to the witness testifying from the memorandum in order to answer this question.)

Question. That was given in the same way by Mr. Bowman, and he took it down as he gave it?

Answer. He measured it and I took it down as he gave it to me.

Question. At the same time?

Answer. Yes; I asked him as he went along if the amount that he was giving me was laid before 1887 or afterwards, and I designated it as I went along.

Question. Now, go on.

Answer. 1,100 feet of 20-inch riveted, 3,500 feet of 16-inch riveted, 1,200 feet of 12-inch riveted, 2,800 feet of 10-inch riveted, 1,200 feet of 8-inch riveted, 5,450 feet of 6-inch riveted, 2,600 feet of 4-inch riveted, 8,300 feet of 6-inch Kalamime, 3,900 feet of 4-inch Kalamime, 1,400 feet of 6-inch Kalamime, 9,425 feet of 4-inch Matthewson; 2,300 feet of 4-inch lap-weld, screwed joint; 1,700 feet of 3-inch lap-weld and about 1,200 feet of 2-inch lap-weld and 1,100 feet of inch and a half. I presume those or the latter part
222 are possibly what extensions have been added and earned by the company, but I don't know as to that.

Question. Mr. Roberts, have you ever examined that ditch known by the somewhat artistic name of infiltration chamber?

Answer. I have not.

Question. I will ask you if you are familiar and have been familiar during all the time since 1887 with the prices of the various kinds of pipe which are now in this system and have been put in since 1887.

Answer. I have been familiar, but to recall the different prices I cannot at the present time.

Question. Do you know the prices at present?

Answer. Yes.

Question. Have you made any estimate of the value of that pipe in the ground at the present time?

Answer. I have.

Question. What is it worth?

(COUNSEL FOR COMPLAINANT: I will object to that question on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I will state, of course, regarding the prices of pipe; I compiled that myself, but I had a man familiar with the business to assist me in regard to the excavating and laying.

Question. That estimate includes the excavating and laying?

Answer. Yes; that is the amount of pipe, as shown by the map he gave me, according to this memorandum, as being in the ground at the present prices of pipe. I mean to say the amount in the

ground prior to 1887 they could replace now by new pipe in the ground, of the same quality, size, and material, for \$15,309.84.

Question. How much higher has this kind of pipe been than it is now for the last seven years back to 1887?

Answer. From memory I wouldn't be able to tell.

Question. Can you give any estimate? Make it as liberal as you can towards the other side.

Answer. Well, I should judge, possibly, taking the difference in freight and everything, close to $\frac{1}{4}$ or $\frac{1}{3}$ higher.

Question. Between 25 and 33 per cent. higher?

Answer. Yes, sir.

Question. Would it exceed that?

Answer. No, sir.

Question. How long have you been mayor, Mr. Roberts?

Answer. Since August, 1891.

Question. Three years?

Answer. Three years.

Question. What has been the character of the water supply since that time as to sufficiency for fire, domestic, and sanitary purposes?

Answer. Well, there has been considerable complaint.

Question. Have you investigated those complaints to see if they were well founded or not?

Answer. Not personally; no.

Question. Have there been any since you were mayor—has there been any trouble with the fire department on account of insufficient water supply?

Answer. There was trouble at one time. I think there was a meeting called for the purpose of disbanding. But whether it was entirely the fault of the water supply or the fault of the engine not being right, I don't remember exactly what it was. It was owing to delay in getting water on the fire, I think.

Question. Did you attend that meeting yourself?

Answer. I did.

Question. Are you a mechanical engineer, Mr. Roberts, and familiar with the operation of steam fire-engines?

Answer. I am.

Question. I will ask you whether or not they can be operated successfully with a pressure of fifteen pounds or less at the hydrant where the hydrant is supplied by a four-inch main.

Answer. I don't think they can, having laid the ordinary amount of hose required for fire purposes. It may be that with
224 a test of one hundred feet of hose they possibly may be able to throw a creditable stream.

Question. I mean as a practical matter, not as a test. You are sometimes compelled in fires to lay considerable more hose than that.

Answer. No; they cannot in regular work and work an engine to the full capacity.

Cross-examination :

Question. Mr. Roberts, why did you make this estimate of the number of miles of pipe that had been laid prior to 1887 and since 1887 with the assistance of Mr. Bowman?

Answer. Well, for my own satisfaction most particularly, and there was one of the company going to come up there and make an estimate for the city, and we thought kindly of their plan.

Question. When was this estimate made?

Answer. About a month ago.

Question. I didn't understand the answer to the last question.

Answer. We were expecting one of the principal owners of the water company to confer with the council and making a certain proposition that we expected we would be able to consider.

Question. What owner?

Answer. Mr. Moorey.

Question. The president of the water company?

Answer. No.

Question. A large stockholder?

Answer. I understand his estate owns a controlling interest.

Question. In the water company?

Answer. Yes.

Question. He, as executor of the estate, wished to confer with you with a view of selling out the water company to the city; where did you get your information?

Answer. It appears that Mr. Bowman had been down there to see him, and he came back here and said Mr. Moorey would like to confer with us.

225 Question. When did he say that?

Answer. About two weeks ago. I am not positive when it was.

Question. I thought you made this map a month ago?

Answer. I made the map; yes.

Question. I thought you made the map because you expected to have this conference?

Answer. Yes; we made the map, expecting to have a conference.

Question. You had received no notice of such steps being taken until after the map was made?

Answer. The estimate was made afterwards. The map was made for my own satisfaction. That estimate in regard to the quality, size of the pipe, etc., was made afterwards.

Question. How long afterwards?

Answer. After Mr. Bowman's return.

Question. Then Mr. Bowman was wrong when he said it was all done at the same time?

Answer. I don't think so. I don't think it was all done at the same time.

Question. Are you sure Mr. Moorey was a stockholder at all in this water company, or his estate?

Answer. He said he was.

Question. Mr. Bowman said he was?

Answer. No; Mr. Moorey said he was.

Question. What do you mean by his estate?

Answer. He married Mrs. Eastman. Mr. Eastman owned the controlling interest in the water company.

Question. He did own it at one time, and that is what you call Mr. Moorey's estate?

Answer. The estate that he represents.

Question. Have you made any estimate from that memorandum that was prepared by you with the assistance of Mr. Bowman of the number of miles of piping that was laid since 1887; don't you know as a matter of fact that the number of miles of pipe laid since 1887 amounts to about nine miles?

Answer. I couldn't tell you.

226 Question. Haven't you any idea?

Answer. I never figured it up.

Question. You say you are a foundryman?

Answer. Yes, sir.

Question. Haven't you supplied the city with hydrants?

Answer. I have.

Question. During the time you were mayor?

Answer. I have.

Question. Is there any other foundryman in town?

Answer. There is not.

Question. If the city owned its own water works, you expected to supply the city with iron piping, I suppose?

Answer. No, sir.

Question. Have you any objections to supplying it with piping?

Answer. Yes, sir.

Question. The same objections that you have to supplying it with hydrants?

Answer. No, sir; for the reason that I went to the expense of making \$150.00 worth of patterns for these fire-hydrants.

Question. And you went to an expense of five dollars for making a map of the pipes and mains, too?

Answer. This was prior to my being in any public office.

Question. Now, your estimate of the size or, rather, of the value of these pipes was based entirely, wasn't it, upon the statements of Mr. Bowman as to what pipes were laid down in the city?

Answer. My estimate of the value of the pipes was based upon my own knowledge of what pipes can be laid down here for.

Question. You don't know what pipes have been laid down in the city of Walla Walla by this water company only by the statements of Mr. Bowman; that is a fact, isn't it?

Answer. Yes, sir.

Question. You don't know the sizes of those pipes, do you?

Answer. Only by what he says.

Question. Now, does that include the labor, when you say that the pipes which had been laid by the water company prior to 1887 are of the value of some fifteen or sixteen thousand dollars; does that include the price of labor of laying those pipes?

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Answer. It does.

Question. Labor is much cheaper now than it was in those times, is it not?

Answer. A little; not much.

Question. How much do you think?

Answer. The city is paying just the same now as then.

Question. The city is paying higher than ordinary people?

Answer. Not higher than I do in my own *owrk*.

Question. You have made no reduction either, then, in the price which you pay your men?

Answer. No.

Question. You don't know anything about the cost of the reservoirs constructed by the water company, do you?

Answer. I didn't figure it.

Question. You don't know the cost of the infiltration chamber?

Answer. Yes.

Question. What is it? I don't mean from Mr. Bowman's memorandum.

Answer. That is all I have got.

Question. You don't know what the water rights are worth, do you, from the supply of those *psrings*?

Answer. I do not.

Question. From your business as foundryman you wouldn't know that?

Answer. No.

Question. You don't know the value of the franchise, do you?

Answer. I do not.

Question. You don't know anything about what the condition of the water company's affairs are, do you?

Answer. I do not.

Question. You don't know anything of the value of this contract between the city and the water company, do you?

228 Answer. I don't; not to the company. I know what it costs the city.

Question. What do you mean? How much does it cost the city?

Answer. Fifteen hundred dollars a year.

Question. You think that is excessive, do you?

Answer. I didn't say so.

Question. You do as a matter of fact?

Answer. For the service rendered I do.

Question. You are interested in the city winning this fight, are you not?

Answer. Not beyond my duty.

Question. You have taken part in all the proceedings that have been taken against our company—an active part?

Answer. I have simply treated it as my duty.

Question. I am not asking you to define your duty. Answer my question. You have taken an active part?

Answer. My duty calls me to do so.

Question. Answer my question. You have taken an active part, have you not?

Answer. Why certainly, because my duty says I have to do it.

Redirect examination:

Question. I will ask you, Mr. Roberts, if the city has brought any suits against the water company.

Answer. I don't think they have.

Question. The suits that you have been interested in are simply suits to defend the city, are they not?

Answer. Yes.

Question. Now, you spoke of this principle stockholder. As I understand you, Mr. Moorey is the husband of the widow of Mr. Eastman?

Answer. Yes.

Question. Mr. Eastman's widow married Mr. Moorey?

Answer. Yes.

Question. Now, has the proposition at different times been made to the city by this water company to sell them to the water plant, or didn't it ever reach the stage of a proposition?

Answer. Yes.

Question. When?

Answer. There was a committee appointed in January, 1890, for the purpose of seeing the water company and seeing how much they would take for the plant.

Question. Was there any response made to that proposition?

Answer. There was, I think. The committee made their report in May, 1890.

— Do you recollect the price asked at that time?

Answer. I do; two hundred thousand dollars.

(Witness excused.)

(Signed)

JOHN L. ROBERTS.

(COUNSEL FOR DEFENDANT: I want to put this memorandum in evidence.

This was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial.)

GEORGE H. SUTHERLAND, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. State your name, please?

Answer. George H. Sutherland.

Question. Where do you reside, Mr. Sutherland?

Answer. In Walla Walla.

Question. How long have you resided here?

Answer. Permanently some eleven or twelve years.

Question. What business are you engaged in?

Answer. In the plumbing business.

Question. Are you familiar with the price of iron pipe of different quality and sizes?

Answer. Somewhat so.

Question. Are you familiar with the cost of water pipe, such pipe as is used in the water system of the Walla Walla Water Company?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial, and on the further ground that the witness hasn't shown himself
230 competent to testify.)

Answer. I will state, with respect to that question, there are some of the kinds of pipe used in the construction of this system that I am more familiar with than others.

Question. Have you ever constructed any water-works systems?

Answer. Yes.

Question. What systems?

Answer. Well, the town of Moscow. Did you desire me to name all of them?

Question. Yes.

Answer. Moscow, Pullman, Tekoa, Colfax, Uniontown. It seems as though there were one or two others, but I can't recall from memory what they are now. The Government water works I put in some year ago. I put in a system for them, and laid a main pipe from reservation to the source of supply.

Question. For the post?

Answer. Yes, sir.

Question. Are you familiar with the cost and value of the Kalamime pipe?

Answer. Yes, sir.

Question. And Matthewson pipe?

Answer. Yes, sir.

Question. And of steel or sheet-iron riveted pipe?

Answer. Some experience, some months or maybe a year past, but the prices vary.

Question. Did you make an estimate at Mr. Roberts' request, with Mr. Roberts, based upon a memorandum he had, of the amount of pipe in the system of the Walla Walla Water Company, as to what that plant was worth?

Answer. Yes, sir. With his suggestion I made an estimate or did some figuring in regard to ascertaining the value.

Question. Based upon this memorandum, which is marked Defendants' Exhibit "B"?

Answer. Yes, sir; I recognize this as the sheet that the number of feet, and so on, was read from.

231 Question. What did you estimate the value of this plant at—that is, so far as concerned its pipe lines laid in the ground at the present time?

(This question was objected to by counsel for complainant on the ground that it is incompetent, irrelevant, and immaterial, and also

upon the ground that it is hearsay testimony, based upon hearsay ; also the use of the memorandum.)

Answer. Do you mean as given to me at present, the whole system ?

Question. Yes.

Answer. My recollection is, in round numbers, it was some fifty-one thousand dollars.

Question. And could it be put in cheaper now than formerly or would it cost more ?

Answer. Well, my observation is it would be somewhat cheaper.

Question. How much cheaper.

Answer. With reference to being cheaper than this estimate was or than what the works cost ?

Question. Would it cost more or less now than at the time between 1887 and the present time ?

Answer. Very much less now.

Question. This estimate of yours includes what, Mr. Sutherland ?

Answer. It includes the number of feet of pipe as given to me as are at present in use in the system, of the various sizes, and the outlay and cost of the pipe laid down here and the labor necessary to lay them.

Question. Did you make an estimate based upon that memorandum as to the value of the plant prior to 1887 ?

Answer. No, sir ; the basis of the calculation, as near as I recollect, was what the material could be laid down for now and the work done at contractors' prices.

Question. How much more would it cost in 1887 than at the present time ?

Answer. I couldn't say, but, judging from the condition of
232 wages, the difference of freight rates, and the cost of raw material, I should think it would reach all the way from five to fifteen per cent. I couldn't state exactly what it would be.

Cross-examination :

Question. You and Mr. Roberts made this calculation together ?

Answer. Yes, sir.

Question. And both concurred in the estimate ?

Answer. I don't remember. In the main, we concurred in it ; yes, sir.

Question. You never examined the other property of the company, did you—the water rights of the company, for instance, and the real estate ?

Answer. No, sir.

Question. And the cost of the reservoirs ?

Answer. No, sir.

Question. Or any other property except those mains and pipes ?

Answer. No, sir ; nothing but what I have just mentioned except what I have seen in passing and observing.

(Witness excused.)

(Signed)

GEO. H. SUTHERLAND.

ALBERT E. GUICHARD, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Give your full name, Mr. Guichard.

Answer. Albert E. Guichard.

Question. Where do you reside?

Answer. In Walla Walla.

Question. How long have you resided there?

Answer. I was born and raised here.

Question. What is your business?

Answer. Machinist.

Question. Are you a mechanical engineer?

Answer. Yes, sir.

Question. What business are you at present engaged in?

Answer. Running one of those fire-engines.

Question. You are an engineer of the fire department?

Answer. Yes, sir.

233 Question. How long have you been an engineer in the fire department of Walla Walla?

Answer. Ten months and a half.

Question. You have run the engine at fires since that time?

Answer. Yes, sir.

Question. What fires have occurred in Walla Walla since that time of any magnitude?

Answer. The City hotel and two fires on Alder street were the only fires of any size.

Question. Now, I will ask you whether or not at such fires or any other fires that occurred during the time you were engineer there has been any scarcity of water or insufficiency of water to supply the engine to its full capacity.

Answer. Yes, sir.

Question. At what fires?

Answer. The last fire on Alder street.

Question. Now, just state the facts concerning those fires in your own language, as to what occurred.

Answer. About the scarcity of water?

Question. Yes.

Answer. Well, I was on the first engine that went out for this last fire on Alder street. I had enough water until the other engine came. When the other engine came it set a block above me. When it first started up I didn't know what was the matter until I noticed that she was getting air. I had to slow down to about half the amount of water I usually use. At the other fire—at the City hotel—I went with the second engine and did not work it at its full capacity.

Question. During the whole time you were unable to get water?

Answer. Yes, sir.

Question. Was that fact reported to the chief of the fire department, Dr. Blalock?

Answer. Yes, sir.

Question. When?

234 Answer. The last time I didn't see him, but I spoke to the assistant chief about it. I was taken sick after that and didn't get to speak to him about the Alder Street fire.

Question. Now, I will ask you—there are a number of business buildings of the city situated upon Main street, are there not?

Answer. Yes, sir.

Question. The water main on Main street is four and six inches, is it not—four inches part way and six inches part way?

Answer. I couldn't tell; I don't know that.

Question. I will ask you whether or not you can attach your suction hose to any of those hydrants on Main street and get a sufficient amount of water to supply two streams thrown from an inch and a quarter nozzle.

Answer. I don't think I could and work the engine to its full capacity.

Question. Can you get sufficient water for one stream if both engines are drawing water from hydrants on Main street?

Answer. Yes; I done that once with one stream from the engine, but not two, though.

Question. I will ask you as a practical matter in the extinguishment of fires whether or not it is necessary to use two streams from the engine.

Answer. Yes.

Question. Why?

Answer. Well, they work from the front and rear and two sides. There is supposed to be four streams from two engines; that gives a stream in front, back, and two sides.

Question. So as to confine the fire to the building it is in?

Answer. Yes.

Question. Can you successfully fight fire in any other way?

Answer. Not very well.

Question. From your experience as an engineer in the fire department, is there any other locality in the city where you could get sufficient water for your four streams from the two engines from the same main?

235 Answer. No, sir; I don't think there is.

Question. Are there localities in the city from which you are compelled to attach to the same main to fight the fire successfully?

Answer. I don't know. Yes; I think there is, on Fourth street.

Question. How about Main street? Can you connect with any main except the Main street main for a Main Street fire?

Answer. Yes; we can go to Alder street.

Question. Is there any disadvantage in going to Alder street?

Answer. It takes more hose; that is all.

Question. And more time?

Answer. That is according to the locality of the fire.

Question. For a Main Street fire it would take more time?

Answer. Yes, sir. The rule is never to pass a fire.

Question. If there was a fire on Main street, you would be com-

pelled to pass it in order to attach to an Alder Street hydrant, would you not?

Answer. Yes, sir.

Question. I will ask you if the matter of time in the early part of the fire is not of great importance.

Answer. Yes, sir; that it is.

Question. Did you make a test of certain hydrants the other day?

Answer. No, sir.

Question. Did you ever make any examination of any of the fire-hydrants in regard to the water pressure at those points?

Answer. Yes; all of them.

Question. I will ask you whether or not at that time there was any water in all of them to run out, or if there was any pressure.

Answer. In some it was very small. In a couple of the hydrants there was hardly any at all. We had to open the hydrant full before the water would run out.

Question. Where was that?

Answer. On Palouse and Tukanon and on Sprague avenue 236 the supply is very small.

Question. Could you operate a steam-engine and throw a stream of water with any force from the pressure at those points?

Answer. No, sir; we couldn't throw one stream to the capacity the engine had.

Cross-examination:

Question. How did you get your position?

Answer. I was appointed by the council.

Question. Do you know through whose influence—have you any idea?

Answer. Why, I had some friends.

Question. Particularly Mr. Roberts?

Answer. Well, yes; to a certain extent.

Question. You made application to him to use his influence?

Answer. I made application through Mr. Betz.

Question. Mr. Betz and Mr. Roberts both assisted you to get your position?

Answer. I had a good deal of trouble to get in.

Question. And it was through their efforts that you got in, wasn't it?

Answer. No; not through Mr. Betz' efforts.

Question. Was it through Mr. Roberts' efforts?

Answer. I don't know how hard he worked for me.

Question. Didn't you thank him after you got your position?

Answer. No, sir; I did not.

Question. You described two or three fires where you say you were satisfied with the streams the engines threw?

Answer. Yes.

Question. Did you ever receive any instructions from the chief of the fire department as to the pressure which you should use with the engines throwing streams?

Answer. No, sir; only at a small fire at a residence.

Question. This was a small fire you described?

Answer. No, sir; it was a pretty good sized fire.

237 Question. How long is generally required to put out big fires?

Answer. I can't say. The longest I was out was four hours.

Question. There was nothing very unusual about that?

Answer. No, sir.

Question. About that time it was a common thing to put out big fires?

Answer. Yes; about that time.

Question. What is the effect, as a general rule, where the engine is pumping from a hydrant, and a second engine that is employed comes out and sets above that engine, attaching to the same main—what effect has that upon the stream of the first engine?

Answer. It takes the water away from the lower engine.

Question. From the first engine so it wouldn't have any water?

Answer. I guess it did do it the other night.

Question. You are a mechanical engineer and engineer in the fire department?

Answer. Yes. I guess it will.

Question. Is that a fact, that attaching the second engine to the same main as the first it reduces the stream one-half in the first engine, and the stream in the second engine is only one-half as great as it would be if the first engine was not attached to the same main?

Answer. Yes. I can't say whether it would be half or not.

Question. Well, about that?

Answer. Well, about; yes.

Question. You spoke of a second fire which took some little time to put out through somebody's fault. What street was that fire on?

Answer. It was here on Fourth street and Rose.

Question. You did put it out finally, did you?

Answer. My engine didn't.

Question. Your engine didn't have any stream at all?

Answer. A very little stream. The other engine did the work.

238 Question. How did it happen when each steamer was equally large that you didn't do any work?

Answer. The other engine was above me.

Question. From what you said a moment ago, the stream above, where the other engine was, would be reduced.

Answer. I was on a different main.

Question. You don't know whether it was a fire-hydrant that you were attached to or not, do you?

Answer. Yes, sir.

Question. Are you sure about that?

Answer. I think I am.

Question. You don't know, though, whether that is the case or not?

(COUNSEL FOR DEFENDANT: I submit that this is not proper cross-examination.)

Question. You are sure that you were attached to the fire-hydrant?

Answer. Don't you think I know a fire-hydrant from a cistern?

Question. I don't know, I am sure.

Answer. I am sure I do.

Question. Are you interested in this litigation?

Answer. No, sir; not particularly.

Question. Not particularly? You are then somewhat?

Answer. I would like to see the city own its own water works, because we have had a good deal of trouble right at our own home with the water works.

Question. Doesn't it interest you also from the fact that you are very friendly with Mayor Roberts and Mr. Betz?

Answer. No, sir.

Question. Doesn't that have anything to do with it?

Answer. It does not.

Question. It is simply from your zeal as a citizen of the town that you desire the city to have its own water works?

Answer. Yes, sir. They couldn't influence me if I didn't
239 think the city should own its own water works.

Question. Did you say that you were positive the pressure on your engine was reduced at the Alder Street fire?

Answer. Yes, sir.

Question. How much was it reduced to?

Answer. To fifty pounds from eighty-five.

Question. It was eighty-five originally?

Answer. Yes, sir.

Question. It worked all right then—when the pressure was reduced?

Answer. Why, yes; the engine worked all right. It wasn't throwing water, though.

Question. Didn't it suck air?

Answer. When I would go over fifty pounds.

Question. But not at fifty pounds?

Answer. About forty-five; it wasn't quite fifty.

Question. In what part of the city was this fire?

Answer. Right at the center.

Question. Have there ever been any other fires in that locality?

Answer. Yes, sir; in the same block.

Question. How long ago?

Answer. I can't say when.

Question. Was there the same trouble then?

Answer. There was only one stream then.

Question. How did it happen that there was only one stream on that? Wasn't two necessary?

Answer. There was another fire. There were two streams from the other engine and one from the one I was on.

Question. You say there was another fire?

Answer. A different fire.

Question. Then there was another stream in use on this other fire you speak of?

Answer. Yes.

Question. And the engine worked all right that time, didn't it?

240 Answer. Yes; there was three streams at the fire before and four at this one.

Question. There were three streams at the fire before. How did that happen?

Answer. Because I was only ordered to throw one line of hose from the engine I was running and there were two from the other engine.

Question. Do you know why that was?

Answer. I suppose because they got enough water from them.

Question. You didn't, at all events, have any trouble in putting out that fire?

Answer. No.

Question. How many fires have there been since you were an engineer in the fire department?

Answer. I couldn't say.

Question. Have you any idea?

Answer. Ten or twelve.

Question. You have discussed this matter generally with the attorney on the other side?

Answer. No.

Question. And with the members of the council and with Mr. Betz?

Answer. No; I just told him about the water supply—that it wasn't sufficient.

Question. You told him only that it hadn't proven sufficient?

Answer. Yes; I did.

Question. Just as detailed here?

Answer. Yes.

Question. Just where it was sufficient and where it wasn't sufficient?

Answer. Yes; I told him that it had only small force outside of the business parts of town.

Question. Were all the other fires outside of the business part of town?

241 Answer. Yes.

Question. You had two streams at the other fires?

Answer. Only at one of the others, and then I stood at a cistern.

Redirect examination:

Question. You spoke of having trouble at your own home about water. Where do you reside?

Answer. On the corner of Chase avenue and Willow street.

Question. Does the company's water system extend out there?

Answer. Yes, sir.

Question. Now, what trouble have you had?

Answer. Before we had a larger main put in we didn't have water supply enough. We have a sufficient water supply now, but not long enough time to irrigate the lawn.

Question. When was the new main put in?

Answer. I guess five or six years ago.

Question. You mean by not long enough time to irrigate your lawn that there is not sufficient water for the time you have?

Answer. There is not enough water force.

Question. Will vegetation, trees, and shrubbery grow successfully here without irrigation?

Answer. No, sir; we can't raise them down at our place without water.

Recross-examination:

Question. Haven't you a nice green lawn at the present time?

Answer. Yes, sir.

Question. Owing to irrigation?

Answer. Yes, sir; but not during the hours given for irrigation. The water company was very lenient this year and didn't watch us.

Question. Have you ever used two sprinklers on the lawn?

Answer. Yes, sir.

Question. How much allowance is given by the water company?

How many hours a day?

242 Answer. Certain hours in the morning.

Question. How many altogether?

Answer. I don't know. I don't attend to that.

Question. You don't then know whether you were irrigating in hours or out of hours?

Answer. I know I have heard the folks say they couldn't do it in the hours given.

Question. You don't know, as a matter of fact, whether that is so or not?

Answer. Yes, sir; I do. They always put a bodyguard out. They used to have a man walking around to see that the water was not used over time.

Question. For all you knew, you were observing the rules? You didn't irrigate day and night?

Answer. No; I think two hours in the morning and two in the afternoon.

Question. I thought you had no idea how many hours?

Answer. I have not; no.

Question. You don't know that it wasn't five hours a day?

Answer. I don't know.

Question. You might have irrigated five hours a day?

Answer. I know in fact that they irrigated enough to wet the lawn, and they said they couldn't do it in the time given them; that it would get yellow and die.

Question. It is a pretty big lawn, isn't it?

Answer. It is a pretty good sized lawn.

Question. Have you any idea of the number of square feet?

Answer. No.

(Witness excused.)

(Signed)

A. E. GUICHARD.

EDWIN G. FANNING, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Give your full name.

Answer. Edwin G. Fanning.

243 Question. Do you reside in Walla Walla?

Answer. Yes, sir.

Question. How long have you resided there?

Answer. Two years last August—since the first.

Question. What is your business?

Answer. Engineer in the fire department.

Question. Did you take the pressure at various hydrants a few days ago?

Answer. Yes, sir; I did.

Question. How long ago was it?

Answer. Well, it was this week some time, I believe.

Question. At how many hydrants did you take the pressure?

Answer. I think there were seven, if I am not mistaken.

Question. Did you take a memorandum at the time of the amount of pressure at these various hydrants in the city?

Answer. No; I didn't take a memorandum.

Question. Do you recollect the pressure at the different hydrants?

Answer. I think I do.

Question. Did you take the pressure at Madison and Whitman street?

Answer. Not being well acquainted, I have to stop and think of the location of the streets. I believe that was the furthest place we went.

Question. What pressure did you find there?

Answer. I found no pressure. It wouldn't register on the *guage*.

Question. There was no pressure there?

Answer. It wouldn't register on the *guage*.

Question. At Grove and Washington street?

Answer. The first hydrant; yes, sir; I believe there was five pounds pressure there, if I am not mistaken.

Question. Palouse and Birch?

Answer. That was ten pounds.

244 Question. Do you recollect whether it was ten or eight?

Answer. Ten pounds, I believe, showed on the *guage*.

Question. Main and Touchet?

Answer. That was five pounds, I believe.

Question. Touchet and Cherry—what pressure did you find there?

Answer. There was no connection made there.

Question. Cherry and Spokane?

Answer. There was no connection made there, either.

Question. Sixth and Elm?

Answer. Twenty-five pounds.

Question. Ninth and Rose?

Answer. Thirty, I believe.

Question. Tenth and Alder?

Answer. Thirty-five, I believe.

Question. How much experience have you had as an engineer of steam fire-engines?

Answer. Very nearly three years.

Question. What experience have you had as a mechanical engineer?

Answer. The number of years, do you mean?

Question. Yes.

Answer. Well, about six years.

Question. What is the variety and make of your engines in use in Walla Walla?

Answer. They are both Silsby's.

Question. Is that a standard make?

Answer. Yes, sir.

Question. How many streams do they throw?

Answer. Two streams.

Question. I will ask you whether or not you can, from the pressure at the various hydrants you have mentioned, throw two streams with an inch and a half nozzle successfully.

Answer. With an inch and a half?

Question. With an inch and a quarter.

245 Answer. From some of them I can, but not from all of them.

Question. Where you have no pressure can you do it?

Answer. No, sir; not two streams.

Question. Where there is five pounds pressure could you do it?

Answer. Well, it would be all owing to the fire.

Question. In case you had a big fire.

Answer. No; I don't hardly think you could in a very large fire.

Question. An adequate system of water works would be such a system as would answer for a big fire, would it not?

Answer. Yes, sir; I should think so.

Question. Have you had any practical difficulty with the water system here at any of the fires in not obtaining a sufficient supply of water?

Answer. Well, I don't know as I was ever troubled any.

Question. At the Alder Street fire were you able to get two streams?

Answer. At this last fire?

Question. Yes.

Answer. There were two streams from the engine; yes.

Question. Do you know whether the other engine was able to get two streams or not?

Answer. I don't know.

Question. You were on the engine above the other engine?

Answer. Yes, sir.

Question. Now, at the Fourth Street fire was your engine above the other engine at that time?

Answer. I don't recollect that fire.

Question. The City hotel.

Answer. Yes; a block above, on Main street, I believe.

Question. Did you succeed in getting two streams from engine on that fire?

Answer. Yes, sir.

Question. Do you know how many the other engine had?

246 Answer. No, sir; I don't. I didn't see that engine at all on the other block, I believe.

Question. What was the size of the nozzle that you used at those fires?

Answer. Well, I think at this last fire there was an inch and three-quarters—one was one-inch and one was three-quarters.

Question. What is the standard size used on fire-engines?

Answer. It is owing to the size of the engine.

Question. For an engine as large as yours.

Answer. The first engine is rated at two one-inch nozzles.

Question. That is, your engine was?

Answer. Yes, sir—that is, the front engine.

Question. Why did you reduce it to a three-quarters nozzle?

Answer. Well, it seemed as though when using a two-inch nozzle the engine fired a little bit harder. It was harder to keep up steam.

Cross-examination :

Question. You don't know anything about the correctness of the gauge you used in making those tests?

Answer. It was a standard gauge, made by the American Steam Gauge Company, accepted as a standard gauge.

Question. You are pretty familiar with the city here, are you not, its physical appearance, what parts are high and what parts are low—the altitude of different parts of the city?

Answer. I have a pretty good idea. I have never been all over the city.

Question. How long have you been a resident here?

Answer. Two years.

Question. Is Grove and Washington higher or lower than Touchet street?

Answer. I can't say as to that.

Question. Can you say whether Palouse and Birch street is higher than Eleventh and Rose?

Answer. I should think it would be higher; yes, sir.

247 Question. You haven't any idea how much higher?

Answer. No, sir.

Question. When did you make these tests?

Answer. It was some time this week. I disremember the time.

Question. Under whose direction?

Answer. The fire and water committee, Mr. Betz and Mr. Ringhoffer.

Question. They were present when the examinations were made?

Answer. Yes, sir.

Question. Did you test all the hydrants in the city?

Answer. No, sir; only those named.

Question. Who picked out the hydrants to test?

Answer. Mr. Betz.

Question. And simply directed you to test these hydrants?

Answer. Yes.

Question. You don't know the pressure at any of the other hydrants?

Answer. No, sir.

Question. During all the time that you have been in the fire department you have never had any trouble in putting out fires; you have not had insufficient water supply?

Answer. I may have been troubled to some extent. I don't remember of any place just now.

Question. How is this test of the pressure made?

Answer. When we went out the other day?

Question. Yes.

Answer. A connection was made directly with the hydrant with the suction hose; then we closed up the valves, and that allowed the pressure to come directly on the gauge.

Question. Where was the gauge when you made the test?

Answer. Right on the pump, connecting the pumps, where it always is.

Question. I don't understand by that description.

Answer. It is located a little back and just above the 248 pumps. There is, you might say, a chamber that runs from the pumps back to the air chamber, and the gauge is located between the air chamber and the pumps.

Question. Had you no hose connected?

Answer. Nothing but the suction hose just to the hydrant.

Question. Were all the outlets actually closed?

Answer. Yes, sir.

Question. What is this air chamber above the pressure gauge—the purpose of it?

Answer. Water being solid, there is no give to it at all, and for that reason in forcing it through a long line of hose the air chamber is put in as a cushion to prevent it bursting the hose.

(Witness excused.)

(Signed)

E. G. FANNING.

J. J. KAUFFMAN, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Give your full name, Mr. Kauffman.

Answer. John J. Kauffman.

Question. Do you reside in Walla Walla ?

Answer. Yes, sir.

Question. How long have you resided there ?

Answer. About twelve or thirteen years.

Question. Are you a member of the Walla Walla fire department ?

Answer. Yes, sir.

Question. How long have you been a member of the department ?

Answer. Well, as a torch boy and member, about nine years.

Question. And in what capacity do you serve now ?

Answer. Well, as hoseman.

Question. Now, I will ask you whether or not, at any of the fires within the last year or two that you have attended in your capacity as hoseman, there has been any scarcity of water.

Answer. I don't think that we have got enough water. At this last fire we couldn't break a window not over twenty feet
249 away, and the glass was, I should judge, about 20 x 28 inches, or larger than that.

Question. Where was that fire ?

Answer. On the corner of Third and Alder street.

Question. You were unable to get a stream of sufficient force to break the glass ?

Answer. Yes, sir.

Question. Were the engines working to their full capacity ?

Answer. I think so, to the best of my knowledge.

Question. Were you able at that time to get a good stream at all ?

Answer. No ; not that I seen.

Question. Is there any other instance that you recall ?

Answer. At most any fire I have been to we haven't had what I would call a good fire stream.

Question. Are you ever compelled at any fires when attempting to use two streams to disconnect the hose and use only one stream ?

Answer. No ; we generally do the best we can with two streams. We have had to check up very frequently.

Question. What was the size of the nozzles—three-quarters and one-inch ?

Answer. Three-quarters and seven-eighths.

Question. Those are the smallest nozzles used ?

Answer. Yes, sir.

Question. Were you present when the hydrants were tested in various parts of the city ?

Answer. Only at three.

Question. What three ?

Answer. Washington and Grove, Madison and Whitman, and Birch and Palouse.

Question. At Washington and Grove how many pounds pressure were there ?

Answer. You might say there was five pounds ; the guage just showed it and that was all.

250 Question. Madison and Whitman ?

Answer. There wasn't any. The guage wouldn't show
21—637

any. We took one section hose off from the cart and attached it to the plug, and it threw a stream twelve or fifteen feet; not over fifteen feet.

Question. The other was Palouse and Birch?

Answer. Yes.

Question. How many pounds pressure did you find there?

Answer. About ten.

Question. From your experience as a fireman, is that pressure sufficient to operate a fire-engine successfully, throwing two streams?

Answer. No, sir.

Cross-examination:

Question. How long have you lived in Walla Walla?

Answer. About twelve years.

Question. How long have you been employed by the fire department?

Answer. I never was employed; I am a volunteer member.

Question. Have you ever been employed in any fire department?

Answer. No, sir.

Question. Then your idea as to what is a proper stream has not been obtained from any other source than your experience here?

Answer. It has not.

Question. You have no knowledge, then, except what you have gained here as a fireman?

Answer. No; but it seems to me anybody could tell what a fair stream was.

Question. A proper stream, then, you think, is such a stream as would break a window?

Answer. At least calculation a twenty-six-ounce glass.

Question. Where were you?

Answer. On top of the adjoining blacksmith shop.

Question. Did you have the hose?

251 Answer. Yes, sir.

Question. The engine stood at Betz' brewery, on the corner there?

Answer. Yes.

Question. The engine was not working under a heavy pressure, was it?

Answer. The engine was working hard.

Question. Under how much pressure?

Answer. I couldn't tell what the pressure was from where I was standing, but I could tell when the engine worked heavy or light.

Question. Whose engine were you with?

Answer. Guichard's.

Question. Does it not throw as good a stream as the other engine?

Answer. I think it throws a better stream. It is the newest engine.

Question. It is usually out on duty?

Answer. It is always on duty; yes.

Question. Were you present at these Alder Street fires that Mr. Guichard testified about; each one of them?

Answer. Each one ; yes, sir.

Question. You were here when he testified ?

Answer. I heard part of his testimony.

Question. I believe it was the last fire that he described as the Alder Street fire.

Answer. There were two fires on Alder street within the last year, I think. I was at the last fire.

Question. Did you have some difficulty at the last fire in obtaining a sufficient water supply, you say ?

Answer. Yes, sir.

Question. And at the first fire, too ?

Answer. Yes, sir.

Question. The same difficulty existed at the first fire as at
252 the second ?

Answer. Yes.

Question. What was the difficulty ?

Answer. We didn't get pressure enough to do any work with.

Question. You had two streams, didn't you ?

Answer. Yes.

Question. You didn't get as large streams as you thought ought to be supplied ; that is the idea ?

Answer. We got as large streams, I think, as the mains could supply, but not what we should have to do any work with a fire.

(Witness excused.)

(Signed)

J. J. KAUFFMAN.

JEFFERSON FAUCETTE, being first duly sworn as a witness on the part of defendant, testified as follows :

Question. Mr. Faucette, what is your full name ?

Answer. Jefferson Faucette.

Question. You live here in Walla Walla ?

Answer. Yes, sir.

Question. How long have you lived in Walla Walla ?

Answer. Twenty years.

Question. Are you a member of the Walla Walla fire department ?

Answer. Yes, sir.

Question. How long have you been a member of the fire department ?

Answer. About three years, I think.

Question. In what capacity are you now serving ?

Answer. As hoseman.

Question. Has there been any difficulty during the last two or three years in the successful extinguishment of fires on account of scarcity of water ?

Answer. Yes, sir ; I think there has.

Question. At what fires has there been such difficulty ?

Answer. Well, the last one on Alder street, as they call it.

Question. What was the difficulty there ?

253 Answer. There didn't seem to be enough pressure—enough force in the water to do any good.

Question. You were acting as hoseman with the witness who last testified?

Answer. Yes, sir.

Question. Did you attempt to break a window glass with your stream?

Answer. Yes, sir.

Question. Could you do it?

Answer. No, sir.

Question. Have you ever noticed from your position that the engines would suck air?

Answer. Well, I don't know; I couldn't tell.

Question. Could you tell from that fact that the water stream coming from the hose would alternate in size—be larger and smaller?

Answer. Yes, sir; somewhat.

Question. Now, at any other fires have you had any trouble?

Answer. I don't remember any other.

Question. Were you using one or two streams from your engine at that time?

Answer. Two, I believe.

Question. What sized nozzle were you using?

Answer. I don't know.

Question. How far could you throw a stream at that time conveniently?

Answer. I don't know; I couldn't say; I didn't measure.

Question. How many feet of hose did you have?

Answer. I can't say that, either.

Question. About how many?

Answer. The engine was standing at the corner of Betz' brewery.

Question. How far is that from where you were attempting to throw a stream to break a window?

Answer. It must have been one hundred feet; maybe a 254 little more.

Cross-examination:

Question. You are attached to the hose department?

Answer. Yes, sir.

Question. Where was this fire in which you say the streams were no good?

Answer. On the corner of Third and Alder street.

Question. Is that the same fire that the other witnesses have testified to?

Answer. I think so; yes.

Question. Was that the last Alder Street fire?

Answer. The last one.

Question. Were you at the first one?

Answer. No, sir.

Question. What buildings were burned at that fire?

Answer. At the last fire?

Question. Yes.

Answer. The one above the blacksmith shop on the corner and the one above that.

Question. Did you say they were completely destroyed?

Answer. I think they were.

Question. I don't mean so far as the value was concerned, but the fire was put out?

Answer. Yes; before it reached the blacksmith shop.

Question. What put it out?

Answer. Water, I suppose.

Question. From the hose?

Answer. It must have been.

Question. From those two streams that you have described?

Answer. There were two more streams besides them.

Question. That is the custom at all the fires in this city, or nearly all, is it?

Answer. No, sir; there have been some fires where there was only one stream.

255 Question. There ought to be four streams?

Answer. I don't know; it is according to the size of the fire.

Question. How far was the blacksmith shop from the building that was next to it?

Answer. Ten feet, I guess; something like that.

Question. It was a pretty good sized building next to the blacksmith shop, wasn't it?

Answer. Yes, sir.

Question. It must have been a pretty good sized building to have four streams, if you regulate the number of streams by the size of the building?

Answer. I guess so.

Question. How long did it take to put the fire out?

Answer. I am sure I don't know how long it was.

Question. Did the fire take place or start in the afternoon?

Answer. No, sir.

Question. In the morning?

Answer. No, sir.

Question. At night?

Answer. Yes, sir.

Question. Have you any idea how long it lasted?

Answer. No, sir.

Question. Did it last as long as two hours?

Answer. I don't know; it must have been; it must have lasted two hours.

(Witness excused.)

(Signed)

JEFFERSON FAUCETTE.

THOMAS MOORE, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Mr. Moore, do you reside in Walla Walla?

Answer. Yes, sir.

Question. How long have you resided here?

Answer. Twenty-five years.

256 Question. What part of the city do you reside in, Mr. Moore?

Answer. At the extreme upper end of Main street.

Question. In what addition is that?

Answer. Cain's addition.

Question. Do you consume city water, Mr. Moore?

Answer. Yes, sir.

Question. How long have you been a consumer of city water?

Answer. I don't hardly recollect; I guess ever since the water works were in.

Question. Do you get an adequate supply of water?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. Well, I did this year, but I never did before.

Question. You didn't last year?

Answer. No.

Question. Well, in what way was your water supply inadequate last year?

Answer. There was no pressure. We were shut off from irrigating when we wanted water in the house. When the sprinkler was running there was no supply in the house, and we would have to shut it off to get water in the house.

Question. Can't you use water in the house and sprinkle at the same time?

Answer. No, sir; this year I could.

Question. Has there been any change made in the system this year, do you know, Mr. Moore—any new mains laid up there?

Answer. I don't think so.

Question. State, Mr. Moore, if this hasn't been a particularly rainy season; this present one.

Answer. I think it was the biggest rainfall in twenty years last year.

Question. Have you ever had your water supply shut off when the company was bringing an additional supply to the city?

257 Answer. In August, I think, when they were running out to the penitentiary, we didn't get any water for seven days, but at night we could get water after 6 or 7 o'clock.

Question. When was that?

Answer. In 1891.

Cross-examination:

Question. What part of the city do you live in?

Answer. On the upper end of Main street.

Question. Near the reservoir?

Answer. Yes; pretty near on a level with it.

Question. About how far from it?

Answer. I guess, about a quarter of a mile; probably a little more than that.

Question. That part of the city has grown considerably, hasn't it, since 1890?

Answer. Yes; about 1890 or 1891.

Question. In 1891 you had a very large growth in that part of the city?

Answer. Yes, sir.

Question. Before that was it thickly settled?

Answer. No.

Question. How thickly was it settled?

Answer. Two or three houses on a block.

Question. As many as that?

Answer. Yes.

Question. You don't know from your own personal knowledge over how large an area this insufficient water supply was?

Answer. Yes.

Question. How do you know that?

Answer. Because we had to go a good ways to carry water for drinking purposes. We had to go over to Mr. Dovell's.

Question. How far was that?

Answer. Across the street; but we couldn't get any water whatever—any hydrant water—for three blocks away at that time.

Question. Was there any necessity of getting it at the hydrant when water was just across the street, or was this hydrant water better water?

Answer. I don't like to use water out of a well that hasn't been used out of except in a case of emergency.

Question. This is very good water?

Answer. I call it very good water.

Question. Have you any difficulty with your present supply?

Answer. Not now.

Question. Your principle difficulty was during 1891, you say?

Answer. In 1891 it was entirely shut off.

Question. In 1892 did you have a good supply?

Answer. We had a better supply.

Question. If you hadn't sprinkled your lawn you would have had sufficient water for domestic use?

Answer. We couldn't get it upstairs at all, and with the pressure we had could only throw it nine feet high.

Question. Is your upstairs higher than the level of the reservoir?

Answer. Yes.

Question. You don't think it would be reasonable for the company to put the water higher than the level of the reservoir, do you?

Answer. They can't do it.

Redirect examination :

Question. I will ask you whether you think it reasonable that you should have water in the second story of your house.

Answer. Well, I would like to have it there awful well.

(Witness excused.)

(Signed)

THOMAS MOORE.

GEORGE C. JOHNSTON, being first duly sworn as a witness on the part of defendant-, testified as follows :

Question. Do you reside here in Walla Walla ?

Answer. Yes, sir.

Question. In what portion ?

Answer. On the upper end of Rose street.

259 Question. In what addition ?

Answer. In Cain's addition.

Question. Are you a consumer of water supplied by the Walla Walla Water Company ?

Answer. Yes, sir.

Question. Have you a connection with the main ?

Answer. Yes, sir.

Question. What is the nature of your water supply, adequate or inadequate ?

(Counsel for complainant objected to this question on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. For three years we didn't have scarcely any supply, but this last summer we had water enough for house purposes and partially for irrigation.

Question. How much force is there on your garden hose ?

Answer. A very little.

Question. Is there enough to properly irrigate with ?

Answer. Not when folks below are irrigating.

Question. For a garden sprinkler ?

Answer. No ; at all times.

Question. I understand that you have to wait until the parties below you shut off the water before you can irrigate.

Answer. We don't pretend to irrigate until other folks have quit.

Question. Do you reside in a thickly populated district—are there many houses around you ?

Answer. Quite a number in my immediate vicinity. There are only four on that block.

Question. Your house fronts on Rose street, and back of you is Main street ?

Answer. Yes, sir.

Question. Do you know whether or not your neighbors have an adequate water supply ?

Answer. I really don't know anything about my neighbors' water supply.

260 Cross-examination :

Question. There are not many neighbors behind you?

Answer. No, sir; there are no neighbors behind me.

Question. You are on a hill, are you not?

Answer. I can't say that I am on a hill.

Question. You are about as high as anybody?

Answer. No doubt. I am pretty nigh on a level with the balance of them.

Question. Is Mr. Moore's house below you?

Answer. No, sir; it is directly opposite.

Question. You are not subject to any restrictions as to water for irrigation?

Answer. Well, I have always been subject—at least I have always followed the rules, unless it was a little in the evening.

Question. Are there any rules restricting you to certain hours?

Answer. I go according to our rules.

Question. Have those rules been enforced against you?

Answer. There has been no complaint as far as my irrigation is concerned.

Question. You have irrigated at times other than described in the irrigation orders?

Answer. Perhaps three-quarters of an hour in the evening after nine o'clock.

Question. That necessarily was the case because you had to wait until the neighbors below you got through irrigating?

Answer. Yes.

Question. You do irrigate during the hours prescribed by the company?

Answer. Yes.

Question. Now, do you know what hours are set apart in that part of the city for irrigating—from four to nine, are they not?

Answer. Yes; I think from four to nine.

Question. Until this last year, have you not been able to
261 get a good supply of water for family purposes at your house?

Answer. Not at all times. I went away below to my neighbors to get water for my family purposes.

Question. How far?

Answer. Oh, about six hundred feet.

Question. For ordinary use of the family?

Answer. For ordinary use; for drinking.

Question. What year was that; 1891?

Answer. It might have been 1891 or 1892.

Question. That was before the main was laid across Touchet street, was it not?

Answer. I really don't know; I don't recollect; but that couldn't affect me, I don't think.

Question. You are not certain as to that?

Answer. No; I don't recollect as to the time.

Question. When did the water improve as to the supply?

Answer. Well, it is only this last year.

Question. The water is good, is it not?

Answer. I have no fault to find with the water.

Question. The only fault now is with the supply?

Answer. No; I haven't found any fault with the water.

Redirect examination:

Question. There — a number of houses in front of your place, on Rose, Cherry, Sumach, and Oak streets, are there not?

Answer. Yes.

Question. And in a direct line with your house?

Answer. Yes.

Question. And all on apparently the same altitude relative to the reservoir?

Answer. Yes; about the same altitude.

(Witness excused.)

(Signed)

GEO. C. JOHNSTON.

Court was then adjourned until tomorrow morning, September 27th, at nine o'clock.

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SEPTEMBER 27TH—nine o'clock a. m.

Court met pursuant to its adjournment of yesterday, and, all interested parties being present, proceeded as follows:

WILLIAM CONLAN, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. What is your full name, Mr. Conlan?

Answer. William Conlan.

Question. You reside in the city of Walla Walla, do you?

Answer. Yes.

Question. How long have you resided there?

Answer. About thirty years.

Question. Are you a member of the fire department?

Answer. Yes.

Question. How long have you been a member?

Answer. Going on eleven years.

Question. In what capacity are you acting?

Answer. I have been on the nozzle and have been a fireman.

Question. A fireman on a steamer and hoseman?

Answer. Yes.

Question. Now, I will ask you during that period, and especially during the last four or five years, has there been any trouble about scarcity of water in extinguishing fires?

Answer. I think there was.

Question. How frequently and on what occasions has that trouble been observed?

Answer. I don't remember now, except those two fires, one at the City hotel and the last one on Alder street.

Question. Both of those were large fires, were they?

Answer. I would call them large fires for this city.

Question. The City hotel was one of the largest buildings in town, was it not?

Answer. It was a two-story building.

Question. What occurred at the City Hotel fire?

Answer. Well, I was fireman on the second engine that
263 come out. The first engine stood on the corner of Fourth and Main, and we stood on the corner of Fifth and Rose. Albert Guichard was engineer. We couldn't get the necessary water.

Question. What did you observe about the pumping? Did the engine suck air?

Answer. Yes, sir.

Question. How many streams were you attempting to throw?

Answer. Two streams.

Question. Were you in sight of the hoseman and nozzle?

Answer. Yes, sir; I could see one line.

Question. State with what force the water was thrown from that nozzle that you could see.

Answer. Well, I didn't pay any attention to the water gauge myself, of course, as I was firing the engine.

Question. Now, at the Alder Street fire—what occurred there?

Answer. Well, I was on the first engine. The first engine stood here on the corner of Third and Alder, and when we started in we had sufficient water, and when the second engine had set on the corner of Second and Alder it drew the water away from us.

Question. Wasn't there water supply enough to supply both engines?

Answer. No, sir.

Question. The same condition existed there as at the former fire, did it—your engine couldn't get a sufficient water supply, but the other engine drew it away from the main?

Answer. Yes, sir.

Question. Could you see the stream thrown from the engine that your engine was throwing?

Answer. No; I couldn't.

Question. Now, have you noticed this same thing at former fires—have you had the same trouble?

Answer. Well, I always thought there wasn't water enough for two engines in one main.

Question. Now, are there portions of the city where if you
264 use both engines you must rely upon one main in order to get near enough a fire for convenient operation of the engines?

Answer. Yes; I presume there is.

Cross-examination:

Question. Do you know anything about the location of the mains in the city of Walla Walla? You don't know how many mains there are?

Answer. No, sir.

Question. You don't know on how many streets they are?

Answer. Not all of them.

Question. Do you know some of them?

Answer. Yes, sir.

Question. How many?

Answer. Well, there is one main comes down Alder street, I believe, from the reservoir—the biggest main we have got.

Question. Is that the only one you are familiar with?

Answer. That is the only one I have paid any attention to.

Question. Do you know how many hydrants there are in the city?

Answer. Yes.

Question. How many?

Answer. Fifty-two.

Question. You don't know what mains there are?

Answer. No, sir.

Question. Then you don't know whether it is necessary for two engines to be supplied from the same main in any part of the city if you don't know where the mains are, except one main?

Answer. Well, I couldn't swear to that, but I know about that on Alder street, and two engines took the water away.

Question. All you know about it is that at those two fires you didn't get what you considered a sufficient supply of water?

Answer. Yes; I don't think we had a good supply of water.

Question. What is your business in connection with fires?

Answer. I am a volunteer fireman.

Question. What was your occupation at the last two fires?

Answer. I was a fireman.

265 Question. What is your business; simply to fire engines?

Answer. Simply to fire my engine.

Question. You had nothing to do with attaching the hose to the hydrants?

Answer. I always do that if I am on duty.

Question. Is that your business?

Answer. I am not bound to, but I do it.

Question. You are not a paid fireman?

Answer. No, sir.

Question. These two fires occurred within the last year, did they not, where you had an insufficient water supply?

Answer. Within the last two months or something like that.

Question. You don't remember much about the fires before that time, whether there was a sufficient supply of water or not?

Answer. I didn't pay any particular attention to it.

Question. You only paid particular attention to the last fires?

Answer. Oh, no; I didn't exactly pay particular attention to them, as far as that is concerned, but I noticed them.

Question. You were directed to pay particular attention to those fires?

Answer. No, sir.

Question. Where were you at the Alder Street fires?

Answer. Sitting over at Henry Retzer's saloon.

Question. During the fire?

Answer. I was there firing my engine.

Question. And you were connected with Guichard's engine?

Answer. Yes, sir; firing his engine.

Question. Did you notice the pressure in his engine?

Answer. I think it was something like—

Question. Did you notice—is that a part of your business?

Answer. No; that is not a part of my business.

Question. Without making a guess, do you know what the pressure was?

Answer. I say it was forty pounds.

266 Question. Do you remember?

Answer. Not exactly.

Question. You are simply guessing at the pressure?

Answer. No; I know from firing the engine; it is a hard engine to fire.

Question. Why is it a hard engine to fire?

Answer. It hasn't got the heating surface or something; I don't know exactly.

Question. It is much more difficult than the other engine to fire, is it?

Answer. Yes, sir.

Question. You don't know why that is?

Answer. No; I don't.

Question. You didn't pay any attention to the streams from the hose at those different fires?

Answer. I couldn't see it at this fire on Alder street.

Question. You don't know what kind of a stream was thrown at that fire?

Answer. No; I didn't pay any attention to it. I couldn't see any-how where I was.

Question. You say one of the engines sucked air?

Answer. After the second engine set on the same main the engine I was on sucked air.

Question. Where was the second engine?

Answer. On the corner of Second and Alder.

Question. You couldn't see that engine?

Answer. Yes; I couldn't see the lines of hose, though.

Question. Did it set on the same street that you were on?

Answer. Yes.

Question. At the first fire were you hoseman or fireman?

Answer. I was fireman.

Question. What kind of a stream was thrown at that time; could you see the streams that were thrown?

Answer. Yes, sir.

267 Question. Was the first fire at the City hotel or on Alder street?

Answer. At the City hotel.

Question. You didn't notice the stream that was thrown from the other engine?

Answer. The other engine was on the corner of Fourth and Main.

Question. You didn't notice the stream from that engine?

Answer. No, sir.

Question. Can you compare that stream with the other? You don't know whether it was weak or strong?

Answer. In the first place, when the fire broke out in the City hotel I attached the suction hose through the plug on the corner of Fourth and Main street, at the City hotel. After I done that—Mr. Fannine, the engineer, likes to do his own firing, and I ran over to the engine-house and helped to get the other engine out, and we ran to the corner of Fifth and Rose and set there.

Question. You don't know why the engine sucked air?

Answer. I suppose for lack of water.

Question. You suppose so? It might have been too much pressure on the engine, couldn't it?

Answer. No; I don't know as there was.

Question. You don't know anything about it, do you?

Answer. About the pressure on the engine? No; I never paid any attention, as I was firing the engine.

Redirect examination:

Question. When you refer to the pressure on the engine do you refer to the steam pressure?

Answer. Well, I couldn't say as to the steam on the engine. There is a water guage and a steam guage.

Question. Which pressure do you refer to?

Answer. At this fire over here there was forty-five pounds water pressure.

Question. Now, your engine worked all right before the
268 other engine attached to the main, didn't it?

Answer. Yes, sir.

Question. And after the other engine attached to the main your engine sucked air?

Answer. Yes, sir.

(Witness excused.)

(Signed)

WILLIAM CONLAN.

HENRY RETZER, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. What is your name?

Answer. Henry Retzer.

Question. Do you reside in Walla Walla?

Answer. I have been for the last pretty near twelve years.

Question. Are you a member of the fire department of Walla Walla?

Answer. I have been for over eight years, and foreman for the last three years.

Question. You were foreman of one of the fire companies here for three years?

Answer. I have been; yes.

Question. During the time that you were fireman——

Answer. I am at present foreman.

Question. During the time that you have been foreman, then, have you experienced any difficulty at any fires by reason of scarcity of water?

Answer. Sometimes I have; yes, quite a good many times. Of course, I attended every fire, except on account of sickness which I have got at the present time.

Question. What circumstances can you give of scarcity of water?

Answer. During the eleven years that I have been living here?

Question. Yes.

Answer. Many times there wasn't sufficient water to supply two streams, no matter where we attached.

269 Question. Now, can you recall any particular times?

Answer. I attended to every fire that we had in this town, as I said, for the last eleven years since I am here. We had fires in all directions, some on Main street and some in other places. I don't think it is necessary for me to——

Question. Just answer my question. I am not asking you the particular places where there have been fires, but as to the particular times and places when you have been troubled with scarcity of water—that is, at what fires water has been scarce.

Answer. During the last eleven years?

Question. During the last five or six years.

Answer. Right here on Main street we have been troubled with water; when we had this fire right up here next to this place, in the Stencil building. This corner was on fire four or five years ago and we didn't have sufficient water.

Question. You say it didn't make any difference where you connected, you didn't have sufficient water?

Answer. I don't say every place we didn't have sufficient water, but most places where we set two engines and laid hose we didn't have sufficient water.

Cross-examination:

Question. There are only two engines, are there not, in town?

Answer. There is two engines to take water from the hydrants and one that takes water from the cistern.

Question. I am not speaking of where you got the water; only as to the number of engines in town.

Question. There is three engines in town.

Question. Only two commonly used?

Answer. Two commonly used for taking water from the hydrants and one from the cisterns.

Question. Only two mostly used?

Answer. Sometimes only one.

Question. According to directions?

Answer. That depends.

Question. What is your business?

270 Answer. I am a saloon-keeper.

Question. Who owns the building?

Answer. The building I am keeping?

Question. Does Mr. Betz own the building? You rent from him.

Answer. Certainly I do. I don't have to if I don't want to.

Question. He is in the city council, is he not?

Answer. I guess; that is not my business.

Question. I want to draw your attention now to Mr. Betz' business.

Answer. I am not under any obligation to Mr. Betz.

Question. Is Mr. Betz in the council?

Answer. Is he?

Question. Yes.

Answer. I guess you know it.

Question. I am asking if you know.

Answer. I know it myself; certainly.

Question. Now, have you been a member of this fire department for ten years?

Answer. Seven years, I say. I have been here ten years.

Question. You have only been a member of the fire department seven years?

Answer. Yes, sir; seven years.

Question. How many fires have you attended?

Answer. Every one there was in this city.

Question. They never all burned up?

Answer. Part of them burned up and fell to the ground.

Question. There have been several fires here?

Answer. Yes, sir.

Question. I wish you would go over all the fires you can and tell where they were.

Answer. And tell all of them? The secretary has got it in his records.

Question. I want you to answer my questions.

Answer. I attended to every one.

271 Question. I want you to tell me, if you can, the fires at which there was not sufficient water—those fires you referred to on your direct examination; you stated that there was one fire here.

Answer. Suppose we stood on Second and Poplar.

Question. What building was it on fire?

Answer. What building was on fire? I was supposing we stood there just for a trial, and then at the time I was foreman I called my engine out and they had to respond.

Question. I wish you would state the first fire that you referred to on your direct examination where you said there was not sufficient water. What building was it?

Answer. I say I can't tell where the first fire was.

Question. You say there were a number of fires where there was not sufficient water?

Answer. Yes.

Question. Name some of them.

Answer. The fire at the City hotel.

Question. The City Hotel fire?

Answer. Yes.

Question. How large was the City hotel?

Answer. 60 x 80, or probably 80 x 100.

Question. Did the building burn up completely?

Answer. It shows plain enough.

Question. Just answer my question.

Answer. It did burn up pretty near altogether.

Question. Was there nothing left standing?

Answer. The sidewalk is there.

Question. Nothing but the sidewalk?

Answer. Part of it.

Question. Part of what?

Answer. Part of the sidewalk.

Question. Was there nothing of the building left?

Answer. Not very much.

Question. How much of it?

Answer. How much? A few boards.

272 Question. Were any of the sills left standing?

Answer. I couldn't see any of them; there are a few boards.

Question. Are there any buildings near where the City hotel stood or was it by itself?

Answer. I should say there are.

Question. Well, are there?

Answer. Several of them.

Question. Those buildings were not burned?

Answer. They were not burned, but they were damaged.

Question. How much were they damaged?

Answer. Well, pretty badly.

Question. How badly—to what extent were they burned?

Answer. To the extent that I wouldn't live in the next one to the City hotel.

Question. People are doing business and living in this building, are they not?

Answer. Undoubtedly.

Question. You put out the fire at the City hotel?

Answer. I didn't; no; I assisted in doing it.

Question. How about some of those other fires, now?

Answer. Which one do you want to know about?

Question. Give us another instance of fire where there was a scarcity of water.

Answer. Well, you ask me a question and — tell me which one you refer to.

Question. I insist that you answer my question.

Answer. I will ask you this certain question: Have you got a thousand-dollar suit?

Question. Answer the question.

Answer. Have you got a thousand-dollar suit?

Question. You are not examining me. Answer my question. Can you recall another fire?

Answer. Well, you want to tell me what fire.
273 Question. I want you to answer my question.

(COUNSEL FOR COMPLAINANT: If the court please, I wish you would instruct this witness to answer my question.)

Answer. The gentleman must say which fire he wants to know about.

Judge DAVIDSON: You must answer the question.

Answer. It is not for me to answer which fire he wants.

(COUNSEL FOR DEFENDANT: It is difficult for the witness, not understanding the English language as well as some of us do, to clearly understand the question.)

Answer. Do you want me to tell about the Stencil fire, for instance?

Question. What fire was that?

Answer. The Stencil building; that was twelve o'clock at night.

Question. On what street was that?

Answer. It was right here on the corner of Second and Main.

Question. Were there any buildings around it?

Answer. Was there?

Question. Yes.

Answer. The whole block was occupied.

Question. Was that building burned up completely?

Answer. Was it?

Question. Yes.

Answer. The inside was all burned out.

Question. The outside didn't burn?

Answer. No; it is a brick wall; it couldn't burn.

Question. That fire was stopped, so that the adjoining buildings were not burned or destroyed?

Answer. No; it was a brick wall, and the others would have been safe.

Question. What peculiar duties do you have in attending fires?

Answer. Doing all the work they can.

Question. How much is all the work they can do?

274 Answer. As much as you are able to do.

Question. That is all you know about what your duties are?

Answer. Oh, no; I know more about my business; excuse me, I thought you were asking what a fireman's duties are.

Question. What are your particular duties?

Answer. To attend to my business, and in case of fires to attend to them.

(Witness excused.)

(Signed)

HENRY RETZER.

WM. PRESTON, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Mr. Preston, you are a member of the fire department of the city of Walla Walla?

Answer. Yes, sir.

Question. How long have you been a member of that department?

Answer. Ten years.

Question. In what capacity have you acted during that time?

Answer. As engineer part of the time.

Question. And what the rest of the time?

Answer. An ordinary fireman.

Question. You have been engineer of one of the present steamers?

Answer. Yes, sir.

Question. During what time were you engineer?

Answer. I was engineer something over three years, now—two years ago.

Question. You have been to the whole or a greater part of the fires which have occurred during the time you were a fireman?

Answer. Quite a number; yes, sir.

Question. Have you ever experienced any difficulty on account of scarcity of water for the extinguishment of fires?

Answer. Yes, sir.

Question. Of how frequent occurrence has that been?

275 Answer. It has been when there were two steamers on one main.

Question. Has that been invariably the case?

Answer. Yes, sir; I have pumped it dry with one steamer.

Question. You have pumped the main dry with a single steamer?

Answer. Yes, sir.

Question. So you could get no water?

Answer. Not in any amount for fire purposes.

Question. In that case, was the fire long continued?

Answer. No, sir.

Question. In how many instances has this been, Mr. Preston?

Answer. Two or three times.

Question. Has it been in all instances when you set two steamers on the same main?

Answer. My experience is that it is not sufficient for four streams of water.

Cross-examination:

Question. You say there was one fire where you pumped the main dry?

Answer. I said I pumped the main dry once.

Question. That was a fire, you say, that didn't last very long?

Answer. Yes, sir.

Question. What put out the fire?

Answer. I say it was pumped dry, so it didn't amount to anything. That was the Whitehouse & Crimmins fire.

Question. You put out the fire shortly?

Answer. Not until we went to another place. The other engine was at work.

Question. They didn't lose everything?

Answer. It was a short fire.

Question. You assisted in putting out the fire?

Answer. Until the water gave out.

Question. What building was that?

Answer. Whitehouse & Crimmins' planing mill.

Question. It was a good-sized building?

276 Answer. A good-sized building; but it didn't burn very much.

Question. Then this other engine put out the fire, did it?

Answer. Yes, sir.

Question. That other engine must have thrown a pretty good-sized stream?

Answer. Yes; a pretty fair stream.

Question. Wasn't it a very good stream?

Answer. Nothing very extra.

Question. Do you know where the mains of the water company are located?

Answer. Not particularly; not all of them.

Question. Do you know where some are located?

Answer. I know what streets the mains are laid in, but I don't know where they are in the streets.

Question. You don't know the different mains in the different streets?

Answer. No, sir.

Question. How was it that the other engine got a supply from their main?

Answer. Because they didn't set at a hydrant; they set in the creek.

Question. How long have you been a member of the fire department?

Answer. Ten years, I think.

Question. Were you appointed by the council?

Answer. No, sir.

Question. The council appointed you recently, did it not?

Answer. No, sir; I am just filling a vacancy.

Question. Who appointed you?

Answer. I took his place by permission of the fire and water committee.

Question. Did you apply for the position?

Answer. No, sir.

Question. What do you mean by permission?

277 Answer. When one of the engineers takes a lay-off you have to get permission to take their place.

Question. Was that asked for for you?

Answer. Yes, sir.

Question. You hold your position under the fire and water committee?

Answer. Yes, sir.

Question. Have you been continuously under the fire and water committee?

Answer. Yes, sir.

Question. Off and on?

Answer. I worked until two years ago, and then I quit.

Question. Why did you quit?

Answer. Because I didn't want to work any longer.

Question. You were not discharged?

Answer. No, sir.

Question. When were you appointed to this vacancy?

Answer. Last Thursday.

Question. Then for two years before that time you were not in the employ of the department?

Answer. No, sir.

Question. You didn't attend the fires during those two years?

Answer. Yes, sir; I have filled places since then.

Question. Vacancies?

Answer. Yes, sir.

Question. By permission of the fire and water committee?

Answer. Yes, sir.

Question. You have done that at different times?

Answer. Yes, sir.

Question. How often?

Answer. I think this is the third time for a few days.

Question. You are sure that it was fully two years that you were out, are you?

Answer. I think it was two years the first of last April, but I wouldn't be sure.

278 Question. You have not a very definite idea?

Answer. I could tell.

Question. You were first appointed or acted as a fireman ten years ago?

Answer. I joined the company ten years ago.

Question. Those fires where you say there was an insufficient water supply were fires that took place several years ago, were they not?

Answer. Yes, sir; some of them.

Question. How long ago?

Answer. Four or five years ago.

Redirect examination:

Question. The fires that you speak of occurred since 1887?

Answer. Yes, sir.

Question. Now, you say *you say* you have been actively connected with the department since you were engineer?

Answer. Yes, sir.

Question. Have you noted the fires since that time?

Answer. When in town, most of the fires.

Question. Have you noticed the same conditions that existed when you were engineer?

Answer. Principally the same; yes.

Question. That is, the two engines would pump a main dry?

Answer. Yes, sir.

Question. Are there any particular fires that have occurred lately where you noticed that?

Answer. Yes, sir.

Question. At what fires?

Answer. This last fire, for instance, on Alder street. There wasn't sufficient water there for two steamers.

Question. Did you notice that at the City Hotel fire?

Answer. No, sir.

Question. As I understand you, you are now acting in the place of one of the firemen who is ill?

279 Answer. Yes, sir.

Question. At his request?

Answer. Yes, sir.

Recross-examination:

Question. Where was your hydrant that you were attached to when there was a fire at some mill here—I forget the name?

Answer. On the corner of Fourth and Oak street, I think—the next street across by that church.

Question. The hydrant on that corner?

Answer. Yes, sir.

Question. Do you know the pressure of the water there?

Answer. I don't know now.

Question. Did you know then?

Answer. No, sir.

Question. Was that not a case of insufficient steam?

Answer. No, sir.

Question. Was it not a case of your engine being defective?

Answer. No, sir.

Question. How do you know that?

Answer. I know it was not.

Question. What reason have you for making that statement?

Answer. Because the engine was in perfect working order.

Question. How long had you been in charge of that engine as engineer before it was called out?

Answer. That time?

Question. Yes.

Answer. Something like a year.

Question. When was that fire?

Answer. Now you have got me. I can't tell you without looking to see.

Question. Well, about when was it?

Answer. I think it was about five years ago if I am not mistaken; four or five years ago.

280 Question. That was the particular fire where you remembered there was an insufficient water supply, or rather noticed more particularly at that fire than at any other?

Answer. Yes, sir.

Question. You are just simply taking these instances as cases where the water supply was insufficient or noticeably so?

Answer. Yes; I noticed several different cases where both engines were connected on the same line of pipe, and there was not sufficient water for both steamers.

Question. Have you ever been employed in any other city as engineer?

Answer. No, sir.

Question. You simply thought that the stream of water was not large enough or high enough?

Answer. There wasn't enough water to supply the steamers.

Question. What did you say?

Answer. If there isn't enough water to hold the pumps steady, you will throw as much air as you will water.

(Witness excused.)

(Signed)

WM. PRESTON.

ROBERT JACKSON WOLFF, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. What is your full name?

Answer. Robert Jackson Wolff.

Question. You are a member of the Walla Walla fire department?

Answer. Yes, sir.

Question. How long have you been a member of the fire department?

Answer. Four years and eight months I have been driving; I have been a member of it about eight years.

Question. You are one of the paid fire department drivers?

Answer. Yes, sir.

Question. You have attended all the fires, then, during the last four years?

Answer. Yes, sir.

281 Question. What has been the state of the water supply during the four years that you have been driving in regard to sufficient water to supply the engines?

Answer. Very poor.

Question. How have you noticed that fact?

Answer. Well, I could see from the nozzle when close to it, and there has been a good deal of kicking from the fire department.

Question. Have the engines that you have driven ever got sufficient water to throw two streams?

Answer. In some cases, and in some cases they have not.

Question. What cases do you remember?

Answer. At the first fire on Alder street I don't think they did.

Question. Do you remember of any other fires in which there was not sufficient water to throw two streams from each engine?

Answer. Well, I don't remember.

Question. Has that been a matter of common comment in the fire department?

Answer. Yes, sir.

Question. For how long a time?

Answer. Ever since I have been in it.

Question. Has that been a constant complaint, that they could not get water sufficient for fires?

Answer. Yes, sir.

Cross-examination :

Question. You say you are a driver of an engine?

Answer. Yes, sir.

Question. What are the duties of the driver of an engine?

Answer. Nothing else.

Question. Except to drive the horses to the fire?

Answer. Yes, sir.

Question. And you manage the horses while there?

Answer. Yes, sir.

282 Question. I understood you once to say that you had no personal knowledge as to insufficient water supply, but it was only your opinion from what other people say about it?

Answer. I can tell from the rattle of the engine whether it is getting water enough.

Question. You judge from the rattle of the engine whether there is sufficient or insufficient water supply?

Answer. Yes.

Question. What makes the rattle of the engine?

Answer. I don't know only what the engineer says.

Question. Who is the engineer of your engine?

Answer. I drive both out at large fires when they need both. There is only one team, and I go back for the other.

Question. Does the city supply teams for the engines or does the water company supply the teams?

Answer. The city supplies the teams.

Question. From where you drive the horses you can see the hose?

Answer. If the fire is near the engine.

Question. The hose is not necessarily in front of you?

Answer. Not always.

Question. You only noticed during the Alder Street fire, I understand you to say, that there was insufficient water?

Answer. That is the only one that was right close to me. That was right in front of me, and I could see the water.

Question. What did you see?

Answer. I saw two streams from the engine.

Question. And the smaller one of those threw air?

Answer. Yes, sir.

Question. Where were those streams that you saw?

Answer. On the fire. They were thrown on the fire.

Question. Where was your position?

Answer. We were standing on Betz' corner, on Third and Alder.

Question. In the middle of the street?

Answer. Yes.

Question. Where was the hydrant?

283 Answer. On the corner of Third and Alder.

Question. Where was the fire?

Answer. In the building known as No. 27 Alder street.

Question. Did you drive two fire-engines to that fire?

Answer. Yes.

Question. You went back for the other engine?

Answer. Yes; I went back for the other one.

Question. How long were you gone?

Answer. I don't know.

Question. Where was the other engine, with reference to the fire on Alder street?

Answer. Where was it set at?

Question. Yes.

Answer. It was set on the corner of Second and Alder.

Question. I mean where is the fire-engine house from which you got it.

Answer. On Third and Rose street.

Question. How far is that from where the fire was?

Answer. Three blocks.

Answer. Was this a pretty big fire on Alder street?

Answer. Two buildings.

Question. Was the fire pretty well started when you first got there?

Answer. Yes, sir.

Question. When you got back with the second engine, was the fire pretty well extinguished or still burning?

Answer. It was still burning.

Question. At that time did you notice the streams of water on the fire?

Answer. After I set the second engine.

Question. You didn't notice the streams from the first engine?

Answer. Yes; because when I set the first engine I jumped right off from my seat and unhitched.

Question. You said where the second engine was set?

284 Answer. Yes, sir.

Question. Did you stay there until the fire was over?

Answer. Yes.

Question. Were there any buildings adjoining the buildings on fire?

Answer. Yes; three or four.

Question. Are those buildings still there?

Answer. Yes, sir.

Question. How many streams were on the Alder Street fire?

Answer. I don't remember how many on the upper engine.

Question. Which was the upper engine?

Answer. The one on Second and Alder.

Question. From that engine don't you know how many streams there were?

Answer. I don't know how many. There were two from the one I was sitting on.

Question. Do you know to what sized main that engine was attached?

Answer. No, sir; I don't know the size of the main.

Question. Do you know anything about the main?

Answer. No, sir.

Question. Do you know where the hydrant was where the second engine set?

Answer. The last engine stood on Third and Alder street.

Question. Those streams rose to the top of the building?

Answer. Those two front ones just about did, and that is all.

Question. How long did the fire last?

Answer. I don't remember.

Question. Have you no idea?

Answer. I don't keep a record of the fires.

Question. How many stories high were the buildings?

Answer. Well, they were one and two story.

Question. One was one story and the other was two story?

285 Answer. Yes, sir.

Question. Which was one story?

Answer. No. 7, it is called.

Question. The one that was closest to you?

Answer. No; the one above that.

Question. You didn't notice the water pressure or steam pressure at the time of the fires?

Answer. No, sir.

Question. That is not your business?

Answer. No, sir.

Question. You don't know why the streams were insufficient?

Answer. No, sir.

Question. You haven't any idea why, but simply you think they were not sufficient in size?

Answer. Yes, sir.

Question. Why do you say there was not sufficient water pressure?

Answer. Because the streams were not sufficient.

Question. That is your only reason, is it, for saying that there was not sufficient water pressure?

Answer. Yes.

Redirect examination:

Question. Have you noticed the engines working at these different fires?

Answer. Yes, sir.

Question. Have you noticed whether or not she was getting air?

Answer. There are lots of them get air.

Question. And when your engine is getting air instead of water

out of a hydrant you think that is evidence that there is not sufficient water?

Answer. Yes, sir.

Recross-examination;

Question. How many times have you noticed that the engine was sucking air?

286 Answer. Several times. I noticed it at the fire on the 28th of February and at the one on the 11th of September.

Question. At both of those fires?

Answer. Yes, sir.

Question. Are those the only fires where you noticed that that you remember of?

Answer. Yes, sir.

Question. Well, you didn't notice the first engine sucking air at the Alder Street fire?

Answer. I don't know anything about the first one; I didn't stay on that engine. I staid on the engine that set last.

Question. Do you know anything about whether or not those two engines were attached to the same main?

Answer. I don't know; they were not set on the same street.

Question. Do you know whether they could have been set on the same main?

Answer. I don't think they could.

Question. They could not?

Answer. No.

Redirect examination:

Question. You set the first engine on Second and Alder?

Answer. Yes.

Question. And the second engine on Third and Alder?

Answer. Yes.

Question. What would have been the closest hydrant to the fire if you had not attached at the corner of Third and Alder?

Answer. Either Third and Main or Second and Main.

Question. How much hose would it require from Third and Main or Second and Main for that fire?

Answer. It would require about five hundred feet.

Question. How much did you require from Third and Alder?

Answer. About five hundred feet to the middle of the block.

(Witness excused.)

(Signed)

ROBERT JACKSON WOLF.

287 JAMES CORLISS, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Mr. Corliss, you are a member of the fire department of Walla Walla?

Answer. Yes, sir.

Question. How long have you been a member?

Answer. Five years.

Question. In what capacity have you acted during that time?

Answer. As second assistant.

Question. Have you attended most of the fires since that time?

Answer. Yes, sir; pretty much all of them since I was here. There was a while I was at Portland.

Question. Now, at those fires have you experienced any difficulty in getting sufficient water?

Answer. I did at the Stine House fire, and the last one on this block on the corner of Alder and Third street there was not sufficient water, for the nozzles couldn't throw it on the top of the building for a while.

Question. How high was the building?

Answer. Thirty or forty feet; it was a two-story building.

Question. And they couldn't throw water to the top of the building?

Answer. Not for a while.

Question. Did you notice the working of the engine?

Answer. Yes, sir.

Question. How was she working?

Answer. It seemed to be working all right. We didn't get sufficient water to run two lines of hose when we first started.

Question. When the fire reaches any size, is it necessary to have a number of streams of water on it?

Answer. That is according to how you fight it, sir.

Question. When the whole building is on fire, is it not necessary, in order to save any other buildings surrounding it, to have water on all sides?

288 Answer. Yes, sir.

Question. Why?

Answer. To save the other property.

Cross-examination:

Question. How long have you been a member of the fire department?

Answer. I have been a member five years and over.

Question. When was this Stine House fire?

Answer. This last year some time.

Question. During the last year?

Answer. Last year.

Question. Do you remember what time of the year?

Answer. I don't exactly remember what time of the year it was.

Question. You have no idea?

Answer. No.

Question. Do you know where the water supply came from that was used in the extinguishment of that fire?

Answer. Yes: the engine stood on the corner of Fourth and Main.

Question. What hydrant was the engine attached to?

Answer. It was right down there by Samuel Dusenberry's store.

Question. You don't know what hydrant it was attached to?

Answer. No.

Question. You don't remember at all?

Answer. I don't remember exactly what one it was. I wasn't around the engine myself. I was around with the nozzle.

Question. How many men have hold of the nozzle at these fires, as a general thing?

Answer. That is pretty hard to tell. They generally have four.

Question. They generally have four?

Answer. If they are there.

Question. What is the necessity of so many men?

Answer. They take turn about by twos; one man can't
289 hold these nozzles.

Question. Why does it take four men?

Answer. They take turn about to relieve each other.

Question. Each man gets tired?

Answer. After a certain time.

Question. What time was the Stine House fire?

Answer. At night.

Question. What time at night?

Answer. Ten or eleven o'clock. The Parrish Restaurant building burned first.

Question. How long did the fire last?

Answer. Very near all night.

Question. Are you sure whether the water supply was from the water company at all or not?

Answer. It was supposed to have been.

Question. You don't know anything about it, do you?

Answer. No.

Question. You don't know anything about the working of the engine during the fire?

Answer. I wasn't around the engine.

Question. You don't know whether it sucked air or not?

Answer. I wasn't around it much. I was up on the building. I know I had no trouble in picking the hose up when water was running right through it.

Question. You are a pretty big man?

Answer. I didn't pick it up; a little man picked it up.

Question. What were you doing?

Answer. I was ordering.

Question. A little fellow carried the hose up?

Answer. Yes, sir.

Question. How many streams were on that fire?

Answer. There were two from our engine and two from the other engine.

290 Question. Were there only two engines called out?

Answer. Yes, sir.

Question. How long did it last?

Answer. All night and part of the next day.

Question. Is it the custom after a fire is out and smouldering to keep a stream of water on it?

Answer. Yes, sir.

Question. When was the fire under control?

Answer. Not until along in the morning—about one or two o'clock.

Question. You say it started about ten or eleven o'clock?

Answer. It was along early in the evening.

Question. I think you said it started about ten or eleven o'clock?

Answer. I don't know just when. I had the company out drilling.

Question. You are appointed by the city council, are you?

Answer. No, sir.

Question. Are you a volunteer fireman?

Answer. Yes; I am a volunteer fireman.

Question. What is your other business?

Answer. Expressman.

Question. You attend all the fires?

Answer. When here.

Question. You are not a mechanical engineer, are you?

Answer. No, sir.

Question. You don't know anything about running an engine?

Answer. No, sir; I don't.

Question. You don't know the cause of an insufficient stream?

Answer. No, sir.

Question. You simply assumed that it was because there was an insufficient water pressure?

Answer. I don't know anything about the engineering department. I know they turned my water off.

Question. Did they ever turn it on again?

291 Answer. Yes.

Question. Were you breaking the company's orders?

Answer. No, sir; not now.

Question. Were you at the time your water supply was shut off?

Answer. No, sir.

Question. Did they just shut off your water supply without any reason?

Answer. It was for not paying them.

Redirect examination:

Question. You may state what occurred when you were out drilling?

Answer. I had the company out drilling. It was while our foreman was away; Mr. Retzer was foreman. I had the company out drilling on the second of October, and we didn't have sufficient water to run the hose.

(COUNSEL FOR COMPLAINANT: I will object to that question and answer for the reason that it is not proper redirect examination.)

Question. You have no ill feeling against the water company because they shut off your water for non-payment of your water rent?

Answer. Not a bit.

Question. You expected it to be done if you didn't pay up?

Answer. Yes.

(Witness excused.)

(Signed)

JAMES CORLISS.

GEORGE H. THOMPSON, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Are you a member of the fire department of this city, Mr. Thompson?

Answer. Yes, sir.

Question. How long have you been a member?

Answer. Two years. I am a paid member.

Question. You are acting as a driver, are you?

Answer. Yes, sir.

292 Question. You became a driver when Mr. Wolf left that employment?

Answer. No, sir.

Question. You are a driver of the hose line, then?

Answer. Yes, sir.

Question. Have you attended all the fires that have occurred in Walla Walla since you were a driver?

Answer. I have not.

Question. During what time have you not attended the fires?

Answer. At the City Hotel fire and the Alder Street fire I was off of duty.

Question. Now, at the other fires that you have attended has there been any difficulty in extinguishing fires on account of scarcity of water?

Answer. I can't say as to that. It is my duty to look after the hose and see that it is properly fixed.

Question. Have you noticed whether there was sufficient water or not?

Answer. No; I can't say that I have.

Question. Have there been any complaints among the members of the fire department of an insufficient water supply?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I have heard some complaints; yes.

Cross-examination:

Question. A man whose duty it is to look after the hose and attend to it properly can't inform himself as to whether there is a sufficient quantity of water, can he?

Answer. Not without neglecting his work.

Question. All he knows is what he is told by the other members of the fire department?

Answer. Yes.

Question. You can't from your own knowledge obtain any opinion as to the insufficiency or sufficiency of the water supply?

293 Answer. I thought I could judge from the force of the stream.

Question. Do you say you can do it?

Answer. I have never paid any attention to it.

Question. Your business is driver of the engine and to look after the hose?

Answer. No, sir; my business is driver of the hose cart.

Question. To attend to that business properly, you can't inform yourself as to whether there is sufficient water supply or pressure furnished by the water company?

Answer. No.

(Witness excused.)

(Signed)

GEO. H. THOMPSON.

ROBERT JOHNSON, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. What is your full name?

Answer. Robert Johnson.

Question. Are you now or have you ever been connected with the Walla Walla fire department?

Answer. Yes, sir.

Question. During what time and in what capacity?

Answer. I have been an engineer and also an active member.

Question. During the time that you have been connected with the department has there been any difficulty experienced on account of the scarcity of water?

Answer. In what way?

Question. In any way or at any time can you get sufficient water to properly supply the engines?

Answer. If there are two engines on one line of pipe, it won't supply both engines without sucking air.

Question. Now, are there parts of the city where, in order to get near enough the fire, you would have to put both engines on one line of pipe?

Answer. Yes, sir.

294 Cross-examination:

Question. How long have you lived here, Mr. Johnson?

Answer. About twelve years.

Question. What is your business?

Answer. Well, I am selling fruit boxes at present.

Question. Have you ever been employed by Mayor Roberts?

Answer. Yes, sir; I worked for Mr. Roberts a good many years.

Question. You are on friendly terms with him?

Answer. We are good friends, I hope, enough.

Question. Did you ever have any conversation with him about this case?

Answer. No.

Question. Not the slightest?

Answer. No.

Question. Who have you had any conversation with about this case?

Answer. Not anybody.

Question. Not at all?

Answer. I may have mentioned it occasionally.

Question. You don't know that you have done so?

Answer. I never said anything that I remember about it. Everybody is talking about it.

Question. Have you any interest in the case?

Answer. No, sir.

Question. Don't you want the city to win the suit?

Answer. I don't care. It is absolutely immaterial to me.

Question. Are you acquainted with the mains of the water company in this city?

Answer. Well, not in particular. I know there are mains in the city.

Question. You know there are some water mains in the city?

Answer. Yes.

Question. You don't know how many?

Answer. No.

295 Question. You don't know on what streets they are laid?

Answer. Yes; I guess I could come pretty near telling what streets they are on.

Question. You don't know what mains are on the different streets, and whether the mains are distinct or not on the different streets, and whether one main, for instance, turns a corner and goes down another street, continuing the same main?

Answer. I know one that turns the corner and goes down another street.

Question. You don't know how many?

Answer. No.

Question. Do you know of any other one that does?

Answer. I guess that is the only one I know of that turns a corner.

Question. Do you know anything about the location of the hydrants of the city?

Answer. I guess so.

Question. How many?

Answer. I never counted them.

Question. Are they scattered pretty well over the city?

Answer. Yes.

Question. On one square are there generally two or three hydrants?

Answer. Yes.

Question. About how many, would you say, on an average?

Answer. I should say two, or something like that; I don't know for sure.

Question. All over the city in the city limits?

Answer. I don't know whether all over the city there are two to the square.

Question. You don't know which ones are attached to the different mains?

Answer. No.

Question. How do you know that in some portions of the city it is impossible to attach the engines to different mains if you don't know the location of the mains?

Answer. I know I have worked around the engines when there were two engines on one main, is all I know about it.

Question. Has the fire department ever been instructed as to the location of the mains?

Answer. Yes.

Question. I am speaking of the mains and not the hydrants.

Answer. That I don't know.

Question. You have never been?

Answer. No; I have never been.

Question. When you started to a fire you attached the engine to the hydrant nearest the fire, didn't you?

Answer. Yes.

Question. Without considering the fact whether or not you were attaching the engines to different mains?

Answer. I paid no attention to that. I would generally go for the one that was closest to the fire. Of course, that was none of my business to attend to that part of it.

Question. What is your business?

Answer. To run the engine; it was when I was engineer.

Question. Did you measure the pressure at the fires from the water?

Answer. Oh, yes; it generally run at a certain pressure.

Question. I am not speaking of the steam pressure; I am speaking of the water pressure.

Answer. Yes; we have a water gauge.

Question. Did you pay much attention to it?

Answer. Yes; I always do.

Question. Are you a volunteer member of the fire department?

Answer. I am an exempt member now, but of course I go to the fires just the same.

Question. Have you ever been employed in the department in any other capacity except as engineer?

297 Answer. No, sir.

Question. As engineer is it not your duty to examine the quantity of water thrown?

Answer. It is my duty, though, to watch the pressure gauge.

Question. Have you ever been instructed to keep the steam pressure to a certain point?

Answer. No; I never was.

Question. What is the rule that you have followed as to the pressure?

Answer. I generally used my own judgment as to that when I was engineer.

Question. You are not an engineer any more?

Answer. No; I am not an engineer any more.

(Witness excused.)

(Signed)

ROBT JOHNSON.

HARRY N. BOYD, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Mr. Boyd, you are a member of the Walla Walla fire department?

Answer. I am.

Question. How long have you been such a member?

Answer. Since last May.

Question. In what capacity did you serve?

Answer. I never had any duty assigned me.

Question. You do what you are ordered to do?

Answer. Yes, sir.

Question. Now, at any fires which you have attended since last May has there been any difficulty on account of scarcity of water?

Answer. The only one was the last fire—on the corner of Third and Alder street.

Question. At that fire were the streams insufficient or did there seem to be a lack of force?

Answer. There seemed to be a lack of force somewhere.

298 Question. Where were you working at that fire—in what capacity?

Answer. On the nozzle.

Question. The nozzle on the hose attached to the first or the second engine that came out?

Answer. The second.

Question. What sort of a stream did you get from that engine at that time?

Answer. Well, at the first part of the fire it seemed to have more strength than later on.

Question. What distance could you throw the stream?

Answer. I didn't notice as to that; I didn't test that. I was sitting on top of the blacksmith shop.

Question. Did that stream have sufficient force to break a window?

Answer. No; not there.

Question. Did you try to break a window with it?

Answer. I tried it twice; that was when the fire was about half over.

Question. When fire is inside a building is it necessary to break a window to get in where the fire is?

Answer. Yes, sir.

Cross-examination:

Question. You didn't try to break a window until the last of the fire, you say?

Answer. It was on the other side of the building until that time.

Question. Your engine was the last engine?

Answer. I believe so.

Question. You spoke about it being the second engine.

Answer. It was on the corner of Second and Alder. I am pretty sure.

Question. You are pretty sure it was the last engine?

Answer. I couldn't say.

299 Question. Do you remember of any other engine coming there after that one was set?

Answer. I don't know whether there was any other after that or not. There were two engines, one on Second and Alder and one on Third and Alder.

Question. Were both engines there when you got there?

Answer. Were both there when I got there?

Question. Yes; was the last one there?

Answer. Both were there when I got there.

Question. Were there two or three engines at the fire?

Answer. Two engines.

Question. Was your stream the last one on the fire?

Answer. I held the nozzle for the first stream and the second stream on the fire, and the last one. I had something to do with three of them. I held the hose of first one and then another.

Question. You say at the start the supply was sufficient?

Answer. I say it seemed stronger than later on?

Question. Do you know why it become weaker later on?

Answer. No; I do not.

Question. Might it not have been the engineer's fault?

Answer. That is not our business. Our business is to see where the water is thrown.

Question. Didn't you pay any attention to the sound?

Answer. I noticed the sound of the engine across the street.

Question. How did it sound?

Answer. In good working order, as it usually does.

Question. Just the same as at the start?

Answer. I didn't notice particularly.

Question. Didn't you notice how high the stream went?

Answer. We tried to throw it on the fire; not to see how high it would go.

Question. Didn't you try to make the stream go as high as it could?

Answer. No; the fire wasn't up that high quite at first.

300 Question. Do you know how far the stream went there?

You were making the stream go as far as possible?

Answer. We tried to throw it on the fire.

Question. You can't tell anything about the force of the stream except you tried to break a window with it?

Answer. That was the main thing.

Question. How far were you away from the window?

Answer. Ten or twelve feet. We were on top of the blacksmith shop, the adjoining building.

Question. How long after you had first been there was it that you noticed the force of the stream?

Answer. I think an hour after the starting of the fire it was on the second house, and I took notice then, not as to the strength of the water thrown so much as whether the water was thrown there or not.

Question. Did you notice the force of the second stream when the fire first started?

Answer. I felt the force of it.

Question. How do you mean?

Answer. I got some of the water.

Question. You got a pretty good stream then, didn't you?

Answer. I think it is sufficient for immediate purposes.

(Witness excused.)

(Signed)

H. N. BOYD.

ROBERT MATTHEWS, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. You are a member of the Walla Walla fire department, Mr. Matthews?

Answer. I am, sir.

Question. How long have you been connected with the department?

Answer. About two years.

Question. In what capacity do you serve?

Answer. I am just a fireman.

Question. During the last two years have you attended
301 such fires as have occurred in the city?

Answer. Not all of them. I have been to one within the last year.

Question. What fire was that?

Answer. The City Hotel fire.

Question. Was any difficulty experienced there by reason of having insufficient water?

Answer. Well, yes; there was; at least that was the complaint of the firemen.

Question. Did you yourself notice the streams that were furnished?

Answer. Well, I noticed that for one steamer we had plenty of water, but for two steamers it wasn't sufficient.

Cross-examination:

Question. For two engines the supply was not as good as you thought it ought to be?

Answer. That is my own idea of it.

Question. What is your position—fireman, engineer, or hose-man?

Answer. I am just a fireman. Anything that the foreman orders me to do I do.

Question. What did you do on that occasion?

Answer. Well, I helped the engine get there and helped get the hook and ladder there.

Question. You helped pull the engine there?

Answer. One engine we have to pull by hand.

Question. When did that engine get there?

Answer. It was the first engine there. It probably got there five minutes after the fire-bell rang.

Question. You were not there before the first engine?

Answer. Yes; just before the first engine got there.

Question. How long did you remain there after the first engine got there? How long did you remain with the engine?

Answer. I wasn't with the engine at all; I was with the hose.

Question. I thought you said you got there with the first 302 engine.

Answer. I said I got there before the first engine got there. I helped to lay the hose.

Question. The hose got there first, did it?

Answer. I wouldn't be positive; I think it got there about the same time.

Question. You don't know whether the hose got there before the engine got there or not?

Answer. I helped lay the hose.

Question. You don't know whether it got there first or not?

Answer. I think it got there about the same time.

Question. Did you get there about the same time the hose got there?

Answer. I was just driving out of town when the fire broke out, and I just hitched the horses and went to the fire.

Question. How long did you remain there at the fire before you started off to help pull the engine?

Answer. I can't say.

Question. Have you no idea?

Answer. Well, I guess the first engine must have been at work fifteen or twenty minutes, or such a matter.

Question. Then you started off for the other engine?

Answer. Yes.

Question. And when you got to the engine-house where the other engine was you helped take that engine out?

Answer. I recollect the engine was sitting out in the road right abreast of the engine-house. I said I helped to pull the engine. I didn't do that. I helped to pull the hook and ladder.

Question. How high was this building?

Answer. Two stories.

Question. Then you didn't go after the hook and ladder until about twenty minutes after the fire started?

Answer. I can't say.

303 Question. And when you got down to the house where the hook and ladder was kept it hadn't started yet?

Answer. No. It was just out in the road.

Question. How many men were there?

Answer. I think there were six or seven of us.

Question. How far was that house from the fire?

Answer. Just one block.

Question. You made no attempt at all, then, to get the hook and ladder there until twenty minutes after the fire started?

Answer. I can't tell. It had been run out into the road from the engine-house.

Question. After you came back to the fire with the hook and ladder what did you then do?

Answer. We took the hooks around the building to pull some old buildings down, and just then Chief Blalock concluded that he didn't want them down.

Question. What part of the building was that?

Answer. The back part.

Question. Was there any stream on the back part of the building?

Answer. It had been moved in front.

Question. When you got back the second time was there any stream on the back of the building?

Answer. I think it had been removed in front.

Question. How long did you remain back of the building?

Answer. Ten minutes or such a matter.

Question. Just looking at the building?

Answer. No, sir.

Question. You didn't do any work?

Answer. I did just what I was ordered to do; I helped draw the hose out.

Question. Where did you see the streams supplied to?

Answer. Where?

Question. Yes.

Answer. They were playing on the fire.

304 Question. On the fire; in front or back?

Answer. Part of the time in front and part of the time behind.

Question. Was there a stream on the fire from behind the building before you went to the engine-house?

Answer. Yes.

Question. Where had you been stopping before you went back to the hook and ladder house?

Answer. I think I had been all around the building.

Question. You don't know?

Answer. Yes; I know in fact that I was.

Question. Just walking around it?

Answer. Yes; working around the fire.

Question. What work did you do?

Answer. The duties of a fireman; whatever I was ordered to do.

Question. What were you ordered to do?

Answer. To go and get the hook and ladder and to straighten the hose out.

Question. What did you do during this twenty minutes?

Answer. I went to work as soon as I got there.

Question. You don't know what you did?

Answer. Yes; I helped run the hose out. I told you that previously, I believe.

Question. When did you notice that these streams were not sufficient—was that towards the end of the fire?

Answer. It was after the second engine was on.

Question. Do you know how long that was after?

Answer. No; I can't tell exactly.

Question. Do you know how high the streams rose?

Answer. No.

Question. Do you know how far the nozzle was from the fire?

Answer. Right close up. At first we had to fall back, as it got too hot for us.

305 Question. How long did it take to put out the fire?

Answer. It took, as I should judge, about an hour or an hour and a half.

Question. Was it entirely out when the engine left there?

Answer. Yes.

Question. Were there two steamers at work there?

Answer. There was one steamer when the fire first started, and two steamers at the last.

Question. Have you any interest in this suit?

Answer. None whatever. I was just asked to testify as a fireman as to how the water supply was. I didn't know anything about it.

(Witness excused.)

(Signed)

ROBT MATHEWS.

HENRY DEBUS, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You are a member of the fire department?

Answer. Yes, sir.

Question. How long have you been connected with that department?

Answer. I couldn't remember exactly; about ten years.

Question. In what capacity are you now serving?

Answer. I am secretary of the company at present.

Question. Do you attend the fires?

Answer. Yes, sir.

Question. I will ask you if there has been any difficulty since you were connected with the fire department on account of insufficiency of water supply since 1887.

Answer. Yes; there has. At the last fire, I believe, known as the Alder Street fire, I was in charge of our company and there was not sufficient water. Our engine sat on the corner of Second and Alder street. After running probably half an hour, our stream

diminished to such an extent that I thought it had probably been shut off, and I sent Frank Weber to find out. He came back with the word that it was on full, but there was a lack of water supply. Our nozzlemen were probably not over twelve feet from the house, and when they were ordered to get inside the house to the fire Mr. Peck had to break the window glass with a pole, as there wasn't force enough in the water to break the glass.

Question. How far was the nozzle from the window when the stream was thrown against it?

Answer. They were just at the edge of the sidewalk, and the house probably stood eight feet from the sidewalk.

Question. This wasn't the stream that was thrown from the top of the blacksmith shop?

Answer. No, sir; the stream was in front.

Question. What do you say as to the sufficiency for fire purposes of a stream of water that won't break a window eight feet away?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. Well, I shouldn't think a stream that couldn't break a window at least fifteen or twenty feet away would be very efficient for fire purposes.

Question. Has this difficulty been general during the last four or five years at different fires, not getting water enough?

Answer. There was a time when we depended upon the Alder Street flume, and we didn't have so much trouble in getting water for fires; but ever since we have been using the plugs there has been more or less difficulty, especially when there are two engines out at the same time.

Cross-examination:

Question. Were you present at the Stine House fire?

Answer. Yes; I was present at the Stine House fire.

Question. How was the source of supply at the Stine House fire?

Answer. I should say at the Stine House fire——

Question. Just answer the question. How was the source of the water supply at the Stine House fire?

307 Answer. I suppose the supply was all right, but there was some trouble as to the engineers, as to their ability to run the engines.

Question. The supply was all right at the Stine House fire?

Answer. Yes; they set at the flume at that time.

Question. That same flume that you spoke about being sufficient for fire purposes prior to using the hydrants?

Answer. Yes, sir.

Question. Do you know anything about how the hydrants are connected with the mains? Did you ever take any part in connecting them with the mains?

Answer. No, sir.

Question. You are not a plumber or anything of that sort?

Answer. No.

Question. You don't know how the connections are made on Main street with the mains?

Answer. No, sir; I can't say.

Question. How long after the fire started was it before you tried to break the windows at the Alder Street fire?

Answer. How long after the fire started?

Question. Yes.

Answer. Well, in the excitement of a fire a fellow can't remember exactly the time; it was shortly after we got there.

Question. It is necessary, you think, as a general rule, to break in windows of burning buildings in order to put a stream on the fire properly, do you?

Answer. If it is inside a room you have to get to the fire, and if there is no other way you have to break windows.

Question. Was that fire inside the building?

Answer. Yes, sir.

Question. Was it in the room the windows of which you tried to break in?

Answer. It was right under the stairway.

Question. Did you try to break in the windows as soon as — got there with the hose?

308 Answer. Do you mean the first thing did we try to break in the windows?

Question. I asked you if the first thing after you got the hose there you tried to break in the windows.

Answer. No; I don't think so.

Question. You don't know how long after?

Answer. No; I don't know how long after.

Question. At the Stine House fire, you say, the trouble was the fault of the engineers?

Answer. At the Stine House fire I was one of the firemen; I helped fire an engine.

Question. Your engine worked all right, did it?

Answer. No; it didn't.

Question. Whose fault was it that you spoke of awhile ago?

Answer. At the Stine House fire?

Question. Yes.

Answer. Well, I said it was the engineer's fault.

Question. Of your engine or the other engine?

Answer. Our engine.

Question. At this other fire you were nozzleman, were you not?

Answer. Yes, sir; I had charge of the hose.

Question. You were not at the engine at all?

Answer. Only when connecting the hose.

Question. But not after that?

Answer. No.

Question. Not at the time you say the streams were insufficient?

Answer. No; at that time I was at the nozzle.

Question. You don't know how the engine was running?

Answer. I do not.

Question. You only know you didn't get such a stream as you thought you ought to have got; is that a fact?

Answer. Yes, sir.

Redirect examination:

309 Question. As I understand you, the engine that you were on at this Stine house was not connected with the water system at all?

Answer. No, sir; neither one of the engines.

Question. That Alder Street flume of which you spoke is not a part of the water system of the Walla Walla Water Company that was the source of supply at the City Hotel fire?

Answer. Yes.

Question. It is not a part of the system of the Walla Walla Water Company, is it?

Answer. I don't think it is.

Re-cross examination:

Question. How do you know?

Answer. I suppose it is not; it run the mill up there.

Redirect examination:

Question. Did this flume run from Mill creek?

Answer. Yes, sir.

Question. Was it an open flume?

Answer. Yes.

Question. The waste of the mill up there?

Answer. Yes, sir.

(Witness excused.)

(Signed)

HARRY DEBUS.

ARTHUR M. ST. CLAIR, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Are you a resident of Walla Walla?

Answer. Yes, sir.

Question. How long have you resided in Walla Walla?

Answer. Very nigh five years.

Question. What business are you engaged in?

Answer. I am working for Whitehouse & Crimmins.

Question. At what business?

Answer. At their mill works.

Question. Are you a member of the Walla Walla fire department?

Answer. Yes, sir.

310 Question. How long have you been connected with that service?

Answer. Pretty nigh four years.

Question. During that time have you attended the fires that have occurred in the city?

Answer. Yes, sir.

Question. In what capacity have you generally acted at such fires?

Answer. For three years I was foreman of the Rescue Engine Company.

Question. And had charge of that company under the chief, I presume?

Answer. Yes, sir.

Question. Now, during the time that you were foreman and since that time, has any difficulty been experienced by that company or by the fire department generally on account of scarcity of water from the water system?

Answer. Yes, sir.

Question. How frequently has the water supply been insufficient?

Answer. Well, as near as I can remember, every time the engines use the hydrants.

Question. You have other sources of supply than the hydrants?

Answer. Yes, sir.

Question. What others?

Answer. Not now, no.

Question. But since you have depended upon the hydrants for your supply has the supply been insufficient?

Answer. Yes, sir.

Question. What shows that?

Answer. Well, the boys come to me and say, What is the matter with the engine? I guess the engine is all right. There is something wrong; I can't get any water. There seems to be some trouble somewhere; I can't get any water.

Question. Have those who had charge of the nozzles reported that there was no water?

311 Answer. Yes; that there was no water on some of the mains where both engines were working out of the hydrants.

Question. Are there any particular fires at which that fact has been more noticeable than at other fires?

Answer. Yes, sir.

Question. At what fires has that been the case?

Answer. At the last fire that occurred here more so than at any others.

Question. I will ask you whether or not that has been more noticeable when the fire was large and continued for a long period of time.

Answer. Well, I will say that—

(COUNSEL FOR COMPLAINANT: I will object to that question as leading.)

Answer. I was going to say that for any large fires we have never depended on the water works for water. We have always used the flume for several large fires that I have attended; but now the flume is gone and we have to use water from the hydrants.

Question. In the case of a large fire which continued for a long

period of time and in which several buildings were consumed, do you depend upon this water supply?

Answer. We would have to now, sir.

Question. Would it stand the working of the engines for several hours?

Answer. Not in my opinion.

Cross-examination :

Question. You have no supply except the fire-hydrants?

Answer. Not at the present time.

Question. None whatever?

Answer. Except Mill creek, if it happens so we can set the engine in Mill creek.

Question. Haven't you fire-cisterns?

Answer. Yes; fire cisterns and hydrants.

Question. You meant cisterns when you said hydrants?

312 Answer. Yes, sir.

Question. Were you also an engineer at the Stine House fire.

Answer. No, sir; I was not.

Question. Were you not there?

Answer. I was there, sir.

Question. In what capacity?

Answer. As foreman of the Rescue Engine Company No. 2.

Question. Are you foreman now?

Answer. I am a fireman now.

Question. Is foreman a higher position than fireman?

Answer. It is merely a matter of form.

Question. It is merely a matter of form and he does not do anything?

Answer. He manages the engine. It is under his direction.

Question. It is a higher position, then?

Answer. Yes.

Question. Were you discharged as foreman?

Answer. No, sir; I resigned as foreman.

Question. And then you went back to fireman?

Answer. Yes, sir.

Question. When did you resign as foreman?

Answer. I can't tell the date; about one year ago.

Question. Have you been a fireman since four years ago?

Answer. Yes, sir.

Question. Have you attended all the fires since then?

Answer. I have, sir, except two.

Question. The engines have generally been close to each other at the different fires?

Answer. Generally within a block or so.

Question. Haven't they been generally on the same block?

Answer. No.

Question. Have they been generally on the same street?

Answer. Yes; on the same street generally.

Question. You never pay any attention to the fact of
313 whether or not the hydrants are attached to different mains,
do you?

Answer. Well, I am not well versed as to where the mains run.
I know the hydrants.

Question. You don't know anything about the mains?

Answer. Yes, sir; I know some of them.

Question. When one engine is at work is the water supply ample?

Answer. With one stream it is.

Question. But not with two streams with one engine?

Answer. No, sir.

Question. You were at the Alder Street fire, too?

Answer. Yes, sir.

Question. Did you have any difficulty at that fire?

Answer. Yes.

Question. Did you have any more difficulty than usual?

Answer. Yes, sir; we did.

Question. Do you know any reason for that?

Answer. I can't tell you. No. 1 engine was getting very good
water. When No. 2 engine commenced operations the boys said
there was no water, and went to the engineer and asked him what
was the matter. He said he had got no water, but he had plenty of
steam. Of course, they didn't have.

(Witness excused.)

(Signed)

ARTHUR M. ST. CLAIR.

NICHOLAS LUX, being first duly sworn as a witness on the part
of defendant-, testified as follows:

Question. Do you reside in Walla Walla?

Answer. Yes, sir.

Question. Are you a member of the fire department?

Answer. Yes, sir.

Question. How long have you been a member?

Answer. Seven years.

Question. In what capacity have you served?

Answer. Just nothing but a fireman?

314 Question. During that seven years have you attended the
fires that have occurred in the city of Walla Walla?

Answer. Some of them.

Question. I will ask you, Mr. Lux, as far as you have attended
the fires, if there has been any scarcity of water for supplying the
engines.

Answer. Yes; there has.

Question. State whether or not that has been infrequent or fre-
quent.

Answer. Well, I noticed it twice.

Question. What times did you notice it?

Answer. That was, I think, three years ago, when a fire was on
Third street. The Union office burned down.

Question. Was there any other time that you noticed it?

Answer. Yes; at the last fire on Alder street.

Cross-examination:

Question. How long have you been a member of the fire department?

Answer. Very near seven years.

Question. How many fires have you attended during that time?

Answer. Very near every one.

Question. Nearly all of them?

Answer. Yes, sir.

Question. In different parts of the city?

Answer. Yes, sir.

Question. Have you any idea of the number of fires?

Answer. No; I couldn't tell. I have been very regular. A few, of course, I have missed.

Question. As many as twenty fires a year during that time, wouldn't you suppose?

Answer. I don't know. Sometimes we don't have that many fires a year.

Question. On an average?

315 Answer. No; I wouldn't say that many.

Question. There have been nearly that many, have there not?

Answer. Well, yes.

Question. Were you at the Stine House fire?

Answer. No; I wasn't in the city then.

Question. You have only twice noticed an insufficient supply of water?

Answer. Yes, sir.

Question. And one of those fires was three or four years ago?

Answer. I think nearly four years ago.

Question. And the other was this Alder Street fire?

Answer. Yes, sir; the Alder Street fire.

(Witness excused.)

(Signed)

NICHOLAS LUX.

RALPH E. GUICHARD, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You are connected with the Walla Walla fire department?

Answer. Yes, sir.

Question. How long have you been a member of that department?

Answer. About six years.

Question. During that period of time have you attended the fires which have occurred in the city of Walla Walla?

Answer. I have some of them. During quite a number of them I have been absent; since I have been elected to office.

Question. In what capacity are you working in the department; has any particular duty been assigned to you?

Answer. I am second assistant chief—that is, since January only.

Question. Has there been any difficulty experienced by the firemen in obtaining a sufficient supply of water?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

316 Answer. It has been the continuous cry.

Question. Have you observed that insufficiency yourself?

Answer. Yes; at the last fire; simply for the reason that I had charge of that fire myself. The chief being absent, the first assistant and myself had charge of the fire.

Question. Was that the Alder Street fire?

Answer. Yes.

Question. What happened at that fire?

Answer. We called out the first engine, and it came out and set on the corner of Third and Alder, at Betz' brewery. We then had a pressure of from eighty-five to ninety pounds. Seeing the fire was gaining headway and had such a start, we concluded to call out the second engine, and I set it on the corner of Second and Alder, at the post-office, on the same main. The first streams were larger than the second engine threw, and I went down to ask for more water pressure. I was told I couldn't have it. The first engine was sucking our water away, so there wasn't enough to throw a good stream. She was carrying forty-five pounds and the other engine was carrying fifty pounds, and neither had sufficient water pressure for the fire. Each engine was sucking air. That is about the only fire I know of, for the simple reason that I already gave. There was another Alder Street fire—the blue front—besides the one I have just told about.

Question. Was there any difficulty experienced there?

Answer. No; I can't say that there was.

Question. But it has been a constant complaint among the members of the fire department ever since you have been there?

(COUNSEL FOR COMPLAINANT: I will object to that question on the ground that it is leading. It is also incompetent, irrelevant, and immaterial, and it is hearsay testimony.)

Answer. Yes; at any time we set two engines on the same main.

Cross-examination:

Question. When did you ask for more water pressure?

317 Answer. After the second engine commenced work.

Question. Who did you ask for more water pressure?

Answer. The engineer.

Question. And he said he couldn't give you any more water pressure?

Answer. He said he couldn't give it to me. He showed me that the engine was sucking air.

Question. Did you suppose that the engineer could give you more water pressure?

Answer. I supposed he could, if there was any to be had.

Question. Do you know the difference between steam pressure and water pressure?

Answer. No; I don't.

Question. What is your business?

Answer. Druggist.

Question. In connection with the fire department?

Answer. Second assistant chief engineer.

Question. Were you appointed by the council?

Answer. No, sir; I was elected by the department?

Question. And approved by the council?

Answer. No, sir.

Question. At the first fire you had charge of it?

Answer. Yes, sir.

Question. The chief had charge of all the others?

Answer. Yes, sir; except this other one on Alder street.

Question. At the other you had no difficulty?

Answer. None to speak of.

Question. No practical difficulty?

Answer. We had the two engines there on different mains—one on Main street and one on Alder street. Whenever we put two engines on the same main we have the same trouble.

Question. You have no difficulty when both are on different mains?

Answer. No.

318 (Witness excused.)

(Signed)

RALPH E. GUICHARD.

HARTWIG O. PECK, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside here in Walla Walla?

Answer. Yes, sir.

Question. Are you a member of the Walla Walla fire department?

Answer. Yes, sir.

Question. How long have you been a member of the fire department?

Answer. Well, I guess it must be close on to two years, if not over.

Question. Have you any official position in the fire department?

Answer. No, sir; I am only an ordinary fireman.

Question. Have you been present at nearly all the fires in the city of Walla Walla during the last few years?

Answer. Yes, sir.

Question. Have you noticed the water supply at those fires?

Answer. Yes; I have.

Question. Can you tell whether or not that supply has been adequate?

Answer. Do you mean the strength from the nozzle?

Question. Yes; has it had sufficient force?

Answer. I know this much: At a good many fires we didn't have strength enough to break glass. I know that.

Question. Was there any fire in particular where the water didn't have enough force to break glass?

Answer. Yes; over here at this last fire on Alder street.

Question. Were you present at that fire?

Answer. I was with the hose; yes, sir.

Question. How far from the building were you at that time?

Answer. Just exactly, I can't tell you; twelve or fifteen
319 feet—something like that.

Question. And you were unable to break the glass?

Answer. We were unable to break it; yes.

Question. From your experience as a fireman, would you say a stream of water that would not break a window glass at that distance was adequate for fire purposes?

(This question was objected to by counsel for complainant on the ground that it is incompetent.)

Answer. I wouldn't hardly think it would be strong enough if it wouldn't break a glass.

Question. It wouldn't be of much use in extinguishing fires, would it?

Answer. Not much. I know I stood on the fence and I forced it open with a pole. I broke the blinds open.

Cross-examination:

Question. Was it necessary that you should have a stream of water in there?

Answer. I think it was.

Question. Where were these blinds that you spoke of?

Answer. In front of the house.

Question. In front of the window?

Answer. Yes, sir.

Question. Do you think it is necessary, in order for a stream to be sufficient to extinguish a fire, that it should break the blinds, window glass and all?

Answer. No; not to break the blinds of a window. When I pulled the blinds open it didn't have strength enough to break the glass.

Question. That was all done at the same time, wasn't it; you pulled open the blinds and broke the glass at the same time?

Answer. No; not all that.

Question. When you pulled open the blinds did you make any trial to break the glass with the stream of water?

Answer. I pulled the whole thing off.

320 Question. What do you mean by saying you pulled the whole thing off?

Answer. The frame.

Question. Did you have charge of the hose at that particular fire?

Answer. No; I did not.

Question. While you were breaking open the blinds of the window was there a stream playing on the window at the same time?

Answer. Yes; right on at the same time.

Question. Was the pole used at work at the same time as the stream when breaking the windows?

Answer. Yes.

Question. But the pole didn't break the windows?

Answer. Not all of them.

Question. Didn't the stream break the windows?

Answer. No, sir; I broke some of the windows.

Question. What other fire have you attended?

Answer. I was at the Stine House fire here when the hotel burned up.

Question. Did you have any difficulty at this fire?

Answer. Yes. There was not so much force of water at the Stine House fire.

Question. The Stine House fire was prior to the Alder Street fire?

Answer. Yes; they were all before that fire.

Question. Do you know whose fault it was at the Stine House fire?

Answer. I know we had the hose right up close to it, but it wouldn't break the large glass.

Question. Do you mean the stream wasn't strong enough?

Answer. Yes; we didn't have the water supply. I don't know whether it was the fault of the engine or what it was.

Question. You simply know the stream wasn't as large as
321 you thought it ought to be?

Answer. In Portland they are larger.

Question. There are larger streams in Portland?

Answer. Yes. I have seen them break glass.

Question. Did they break glass with blinds in front?

Answer. I can't say as to that.

Question. You don't know anything about that in your experience?

Answer. No.

Question. You don't know whether those engines were attached to different mains or not?

Answer. No, sir; I don't know what mains they were attached to.

Question. You don't know whether the engineers at those fires performed their duty properly?

Answer. I don't know; that is something I can't swear to.

Redirect examination:

Question. When you were trying to break the glass with the water did you throw the stream directly against the glass?

Answer. Yes. I was standing on the walk in front.

Question. How far away from it did you say?

Answer. Twelve to fifteen feet or something of that kind. I wasn't close to it.

(Witness excused.)

(Signed)

H. O. PECK.

ROBERT H. OSBORNE, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Give your full name.

Answer. Robert H. Osborne.

Question. Do you live in Walla Walla?

Answer. I do.

Question. How long have you lived there?

322 Answer. Four years.

Question. Do you remember the fire in Walla Walla known as the City Hotel fire?

Answer. Yes, sir.

Question. When was that, Mr. Osborne?

Answer. —.

Question. Where was the City hotel situated?

Answer. On Fourth street.

Question. Did you have a store near it?

Answer. I did. I had a building burn down at the same time.

Question. Were you present at the fire?

Answer. I was.

Question. Do you know Y. C. Blalock, the chief of the fire department?

Answer. I do.

Question. State if you saw Mr. Blalock giving orders to firemen at that fire.

Answer. I heard him say, "We can't get water from this hose; we will have to shut it off."

Question. What hose?

Answer. The men were holding a hose, trying to get water out of it, but it fell down and didn't amount to anything.

Question. That engine was attached to the hydrant?

Answer. I suppose it was; I didn't see the engine.

Question. Did they move as directed?

Answer. They quit; they didn't throw any more water on the buildings.

Question. You were the owner of one of the buildings?

Answer. Yes.

Question. You were interested in the fire being put out?

Answer. I should say I was.

Question. You wanted to see them throw as big a stream as possible?

323 Answer. I would like to have seen some thrown, but they didn't throw any.

Question. Wasn't that fire put out?

Answer. Not until after it burned my building and the hotel.

Question. Were there any other buildings around there?

Answer. Yes; there were.

Question. Were they burned?

Answer. Partially.

Question. Did they get no water at all?

Answer. Not on my building until after it was too late.

Question. Do you know where the supply of water came from?

Answer. I don't know anything about it.

Question. Do you know what the water-supply pressure was?

Answer. No, sir; I am not an engineer; I don't know anything about it.

Question. Do you know the cause of the insufficient supply of water?

Answer. I do not.

Question. Do you know whether it was the fault of the engineer or not?

Answer. I don't know.

Question. That was not the same fire that was known as the Stine House fire?

Answer. No.

Question. It was in the same locality?

Answer. The Stine was on Main street. This was on Rose and Fourth.

Question. Was it attached to the same source?

Answer. It was.

Question. To the same water supply?

Answer. I think so.

(Witness excused.)

(Signed)

R. H. OSBORNE.

324 JACOB BETZ, being first duly sworn as a witness on the part of the defendant-, testified as follows:

Question. Mr. Betz, do you reside in Walla Walla?

Answer. Yes, sir.

Question. How long have you resided in Walla Walla?

Answer. A little over twenty years.

Question. Are you a property-owner here?

Answer. Yes, sir.

Question. Are you a member of the city council?

Answer. Yes, sir.

Question. Have you ever been connected with the fire department in this city?

Answer. I have, sir.

Question. In what capacity?

Answer. As a member. I was foreman of the Tiger engine company for seven years and chief engineer also.

Question. Now, during what time were you connected with the fire department?

Answer. I have been connected with it for twenty years this last October.

Question. Mr. Betz, did you about a week ago take the water pressure at the different hydrants in the city?

Answer. I did, sir.

Question. At what hydrants?

Answer. At the corner of Madison and Whitman, Grove and Washington, Palouse and Birch, East Main and Touchet, Touchet and Cherry, Cherry and Spokane, Sixth and Elm, Ninth and Rose, and Tenth and Alder.

Question. Now, at Madison and Whitman streets what pressure did you find?

Answer. No pressure.

Question. Did you attach the engine to take this pressure?

Answer. Yes, sir.

325 Question. And the water didn't run quite into the engine?

Answer. No, sir; it just barely came up.

Question. At Grove and Washington?

Answer. Five pounds.

Question. Palouse and Birch?

Answer. Palouse and Birch, ten pounds.

Question. East Main and Touchet?

Answer. East Main and Touchet, none.

Question. Was the same condition there as at Madison and Whitman?

Answer. Yes.

Question. Touchet and Cherry?

Answer. We stopped the water off with our hands. When we opened the main the supply suction was open, and Mr. Ringhoffer held his hand against it and stopped the water. We didn't consider the amount of pressure was worth taking.

Question. Cherry and Spokane?

Answer. Five pounds.

Question. Sixth and Elm?

Answer. Twenty-five.

Question. Ninth and Rose?

Answer. Thirty-two.

Question. Tenth and Alder?

Answer. Thirty-five.

Question. Now, at Madison and Whitman are there a number of buildings requiring fire protection?

Answer. Lots of them; yes, sir.

Question. How is it settled up—what class of houses and how thick are they?

Answer. The residences are pretty good residences around there.

Question. How at Grove and Washington?

Answer. It is thickly settled with fine buildings.

Question. Palouse and Birch?

326 Answer. At Palouse and Birch are also nice residences—the finest residences in town.

Question. Main and Touchet?

Answer. Also residences.

Question. Touchet and Cherry?

Answer. Also residences.

Question. Cherry and Spokane?

Answer. Residences and a school-house.

Question. How large is the school-house—how many stories high?

Answer. It seems to me it is two stories and a basement, and extends over the ground sixty or seventy feet, I suppose.

Question. What size is the main on Madison and Whitman?

Answer. It is a ten-inch main running down Whitman street, and I think that the pipe is attached to a ten-inch pipe. I am sure I seen it when it was put on.

Question. At Grove and Washington what size is the main?

Answer. It is a six-inch main.

Question. Palouse and Birch?

Answer. A four-inch main.

Question. Main and Touchet?

Answer. Four-inch.

Question. Touchet and Cherry?

Answer. Four-inch.

Question. Cherry and Spokane?

Answer. Four-inch.

Question. Sixth and Elm?

Answer. That is a six-inch main.

Question. Ninth and Rose?

Answer. It is a four-inch main.

Question. Tenth and Alder?

Answer. That is a four-inch main.

Question. Now, from the experience you have had as a fireman, what would you say, Mr. Betz, as to whether or not a steam-engine could operate successfully and throw two streams from a
327 hydrant attached to a four-inch main where there is no pressure?

Answer. It can't operate successfully.

Question. How about a case where there is only ten, twelve, or fifteen pounds pressure?

Answer. What size main?

Question. A four-inch main.

Answer. It can't supply a steamer to its full capacity nor run a steamer to its full capacity.

Question. During the time that you have been connected with the fire department, especially since 1887, what difficulty has been experienced by the fire department in getting sufficient water to supply the engines to operate them to their full capacity?

Answer. Since 1887 they commenced to put in fire-hydrants. Our streams and ditches that we used to have around town not being able to supply the engines on account of people using the water from them for irrigation purposes, after Walla Walla became thickly settled they put hydrants in certain localities. The first were put in the central part of the city. If I recollect right, they sent to Portland or somewhere for five or six hydrants, and had one placed at Sixth and Main street, one at Second and Alder, one on

Willow and Chase avenue, one at Sixth and Poplar, and also one on Elm and Sixth street; that is all they had.

Question. Then you have continued to place hydrants as the growth of the city demanded?

Answer. Yes; some were made right here in Walla Walla, I believe, twenty or somewhere near that, and distributed all over the city where there were proper mains.

Question. Now, since you have to depend upon the hydrants for your source of supply, do you have any difficulty in any department in getting a sufficient supply of water for fires?

Answer. We couldn't near get a sufficient supply from any four-inch mains—never could. We did get a fair supply from the Sixth Street main. It is a six-inch main that that hydrant is attached to.

We could hardly run one engine.

328 Question. Have you observed this difficulty at any particular fire or drills?

Answer. I have, sir.

Question. State what fires or drills.

Answer. We had several fires lately, and where the coupling was made there wasn't enough water.

(This answer was here objected to by counsel for complainants on the ground that it is not responsive to the question, and it is incompetent, irrelevant, and immaterial.)

Answer continued. I was present at several fires lately when the engine was set on a four-inch main, and the water gave out on account of running two lines of hose. We could only use one line of hose.

Question. Have you observed this when only one engine was pumping from the main?

Answer. Only one; yes; on a four-inch main. We had also a fire where we used one engine on Third and Main street, and we had a pretty fair supply, and we had one engine placed on Second and Alder street. We had a pretty fair supply from the six-inch main.

Question. Have you had any occasion to notice whether or not a six-inch main would supply two engines?

Answer. It will not do it, sir.

Question. With the pressure you have?

Answer. We have had occasion to observe that fact, that it wouldn't run two engines from a six-inch main.

Question. Have you ever had occasion as a member of a committee of the city council to ask the water company to extend their mains so as to give you other fire-hydrants?

Answer. I have, sir.

Question. When was that? State in full.

Answer. This was about in 1892. In July or August—July, I think; if you examine the records, they will show. The chief engineer brought in a report that more—

329 (Counsel for complainant here objected to witness stating the contents of the report of the chief engineer as hearsay and not the best evidence.)

Answer continued. He reported that the mains should be extended for fire protection, and it was referred to the committee on fire and water to confer with the water company to have certain mains laid. I went to the president of the water company, Mr. O'Donnell, to ask him about it, and he said—

(Counsel for complainant here objected to the witness making any statement as to what Mr. O'Donnell said.)

Question. Mr. O'Donnell was at that time president of the Walla Walla Water Company?

Answer. Yes, sir; and he said to see the balance of the directors. In August some time, the first part of August, Mr. Bowman notified me that the directors of the water company would meet the fire and water committee in their office, and we did so. The committee consisted of Mr. Jones, Mr. Muntinga, and Mr. Betz. We met the directors at half past two on August 9th. When we met there we stated the request to the directors, which consisted of Mr. O'Donnell, Miles C. Moore, and B. F. Stone. There were present in the room Mr. Turner and Mr. Bowman at the time. The committee on fire and water requested them to put in some mains from Main and Third street up to the engine-house, so that we could place fire-hydrants at that point. We also recommended that a main should be extended down Chase avenue and down to Chestnut street as far as Sprague avenue, so we could place a fire-hydrant there. There didn't use to be a fire station there, and we couldn't get water sufficient to put fire out. Mr. Moore was spokesman of the committee at the time they met, and he asked us, or told us, rather, that the mayor of the city had taken quite an important stand in regard to fire-engine-supply water for the city, and he didn't see fit to put any more money in the ground. He said, "I would rather take that money and fight the city." Mr. O'Donnell made a sugges-

330 tion that this request of the committee on fire and water should be granted, and they had a vote on it and carried it. I reported at the following meeting to the council that the water company had agreed to put in those extensions of mains on Chase avenue, also from Main and Third to the engine-house, and the company since that, about three or four months after, laid a main from Chase avenue to Chestnut street, running down Jackson to Sprague avenue, and the city put a fire-hydrant there. The other request to place a main from Third and Main street to the engine-house hasn't been complied with up to this time.

Question. I will ask you whether or not a hydrant is necessary there for fire protection.

Answer. It should be there by all means.

Question. What is the class of the property of that neighborhood?

Answer. It is in the heart of the city. If there should be a fire on any of those blocks near the engine-house the engine would have to go to the corner of Third and Main street, and if there should be a fire below the city hall the engine would have to run

back of the engine-house and down the alley, which would necessitate considerable delay in putting out fires.

Question. Now, Mr. Betz, are you acquainted with the supply of water that is furnished by the Walla Walla Water Company in different parts of the town for domestic and irrigation purposes?

Answer. I know about; yes, sir.

Question. State whether the supply is adequate or not.

Answer. I will say that the supply is inadequate.

Question. You have investigated the matter, have you?

Answer. Yes, sir.

Question. In what parts of the town particularly did you find it inadequate?

Answer. I found the supply insufficient above First street, in the First and Third wards.

331 Cross-examination :

Question. How long have you been a member of the city council?

Answer. A little over three years—three years and two months.

Question. You have always taken an active interest in the affairs of the city?

Answer. I have, sir.

Question. You have made various examinations from time to time as to the sufficiency of the water supply?

Answer. I have, sir.

Question. You have familiarized yourself with the mains of the city?

Answer. Yes.

Question. And with the size and quality of the mains?

Answer. Pretty near; yes, sir.

Question. And reached the conclusion that the supply was inadequate?

Answer. That is what I did, sir.

Question. When did you reach that conclusion?

Answer. In 1887 and before that time.

Question. Before that time?

Answer. And right along.

Question. Right along up to the present time?

Answer. Yes, sir; before I thought of going in to the council.

Question. Do you know whether the bills of the water company have always been paid by the city?

Answer. Yes; since I have been there, I know. I understand, however, there was a bill not paid for one year, in 1887, up to April, 1888, I believe.

Question. Were you in the council then?

Answer. No, sir.

Question. How do you know that?

332 Answer. I looked up the records.

Question. They just hadn't presented the bill?

Answer. Yes.

Question. Was it paid?

Answer. Yes, sir.

Question. All the bills have been paid without any protest?

Answer. Since; yes.

Question. Have you ever made any other applications for mains except this one you speak of?

Answer. I haven't, sir.

Question. They complied with this request?

Answer. Yes, sir.

Question. You have a main up near your house?

Answer. At my house?

Question. Yes; near it.

Answer. I will ask where my house is situated.

Question. I simply asked you the question if you have water right near your property on Chase avenue.

Answer. Yes, sir.

Question. Do you know whether a main runs along right near your property?

Answer. On Chestnut street; yes, sir.

Question. You made that request?

Answer. For fire protection; yes, sir.

Question. It runs by your house?

Answer. Near where my house is situated.

Question. You say you have made various tests of the sufficiency of the water supply?

Answer. Yes.

Question. When?

Answer. Last Saturday.

Question. Do you remember the other tests you made and the result?

Answer. Yes, sir.

333 Question. It was always the same as this last time?

Answer. Yes; pretty near the same.

Question. You don't remember whether it was exactly the same?

Answer. Yes, sir; three or four years ago.

Question. How do you remember this last test?

Answer. It was made last Saturday.

Question. You are positive the result of those tests was as stated in your examination?

Answer. Yes.

Question. Did you attach the hose to all the hydrants where you made this test?

Answer. What hose do you mean?

Question. The fire-engine hose.

Answer. Do you mean the suction hose?

Question. Yes.

Answer. The suction hose was attached to the fire-hydrant.

Question. In all cases?

Answer. Yes; the suction can't run the engine.

Question. After attaching the hose did you hold the discharge pipe the same as they do around here?

Answer. Yes, sir.

Question. Did you attach the hose on Madison street?

Answer. Yes, sir.

Question. What pressure did you find there?

Answer. The water came right up out of the nozzle; we put on one line of hose.

Question. Isn't it a fact that it threw a stream ten or twelve feet high?

Answer. No, sir.

Question. Are you positive of that?

Answer. I am positive; yes, sir.

Question. Do you know the size of the main there?

Answer. Yes, sir.

334 Question. Do you know where the mains are laid by the water company in the different parts of the city?

Answer. I do not.

Question. Do you remember the time they were laid?

Answer. I can't say.

Question. Not so as to testify now, but when they were laid you were cognizant of their being laid?

Answer. I was. I seen some of them laid; in fact, most of them. I couldn't say when they were laid.

Question. You didn't make any complaint as to the size and quality of the mains to the water company, did you?

Answer. I did not.

Question. When you made these tests of the water supply and pressure, Mr. Betz, did you shut off the water supply of consumers in that part of the city or not?

Answer. I did not, sir.

Question. Do you know whether that is done when there are fires?

Answer. I don't know, sir.

Question. You don't know anything about that?

Answer. No, sir.

Question. Did the health officer ever make a request of you to use water for flushing purposes?

Answer. No, sir.

Question. Never at any time?

Answer. No, sir.

Question. You spoke of one district in this town not sufficiently supplied with water. Is that district the Chinese wash-house district?

Answer. The Chinese wash-house district.

Question. Was that Chinatown district?

Answer. No, sir.

Question. Isn't there a pretty fair water supply near Chinatown?

Answer. There is one two-inch pipe that passes Third street.

Question. And isn't the creek in that direction?

335 Answer. Yes, sir.

Question. What is the name of that creek?

Answer. Mill creek.

Question. Do you know whether the water in that creek has ever been used for fire purposes?

Answer. It used to be.

Question. It is a pretty good-sized creek?

Answer. Sometimes the channel is on the other side, so we can't reach it.

Question. On the other side. What do you mean?

Answer. I say you can't reach it with the suction hose sometimes. The channel is in the center sometimes, and then you can reach it with the suction hose.

Question. Is it necessary to have the suction hose in the center of the stream?

Answer. Not if it is covered with water.

Question. How deep is the creek?

Answer. In some places it is pretty shallow.

Question. How shallow?

Answer. Four or five inches deep.

Question. The only difficulty is extending it into the stream?

Answer. We have got but twenty-two feet of suction hose with each engine.

Question. There is nothing preventing you carrying more, is there?

Answer. We can't do it; we haven't got it.

Question. There is no difficulty in doing it, is there?

Answer. When you draw out more suction hose you can't get the pressure.

Question. How wide is that stream there?

Answer. About fifty feet wide, I should judge.

Question. The channel is on the other side of the stream?

336 Answer. Sometimes.

Question. It changes, does it?

Answer. Yes.

Question. Daily, or at different seasons?

Answer. Every time during the freshets of the winter season.

Question. Is that stream ever so low down that twenty-two feet of suction hose wouldn't reach it?

Answer. Most of the summer time.

Question. How deep is the water at the shallowest part of the stream?

Answer. I can't say exactly.

Question. How can you tell whether or not the suction hose won't work?

Answer. It works some places, and some places it don't.

Question. Don't it work in the shallowest places?

Answer. No; the shallowest places are only three or four inches deep, and we can't put a suction hose there.

Question. How much is required?

Answer. About a foot, anyhow, and the more the better.

Question. You have taken a great deal of interest in this lawsuit?

Answer. I have, sir.

Question. You are deeply interested in it?

Answer. I am, sir.

Question. You have made these tests personally and not under the direction of the foreman during the July tests mentioned?

Answer. I did, sir.

Question. You didn't discuss the matter with others?

Answer. I didn't. I ordered the engine out on Saturday, and there were fellows standing around that wanted to go along and I told them to come along.

Question. This is your own testimony, from your own personal knowledge and observation?

337 Answer. There were some other fellows saw this the same as I did.

Question. It wasn't outlined from any former meeting where the matter was discussed?

Answer. No, sir.

Question. And the inadequacy of the water pressure during those tests is from your own personal knowledge?

Answer. Yes.

Question. You attended most of the fires?

Answer. Yes, sir.

Question. And were in town most of the time?

Answer. Yes; I was very seldom out of town.

Redirect examination:

Question. I will ask you, Mr. Betz, why you do take an interest in this matter?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I am a property-owner here and pay taxes and pay insurance only of about fourteen hundred dollars a year, for my property is all situated right in the heart of the city, and I want to get a little more water, if it is possible to get it.

Question. Now, Mr. Betz, what are the rates of insurance?

(This question is objected to by counsel for complainants, on the ground that it is incompetent, irrelevant, and immaterial, and also on the further ground that it is hearsay evidence.)

Answer. (Not answered.)

Question. You pay insurance yourself?

Answer. Yes.

Question. You don't ask anybody what you pay?

Answer. No, sir; I pay three and one-third on the brewery a year, and one dollar and ninety cents across the way and about one dollar and ninety cents on the Delmonico hotel. I forget the rate on the dwellings.

338 (Counsel for complainants here moved the court that witness' answer be stricken out as not responsive to the question.)

Question. Do you know how the rates in this town are as compared with others where there is an ample water supply?

(This question was objected to by counsel for complainants, on the ground that the answer called for would be hearsay.)

Answer. I think we pay the most of any city surrounding us.

Witness was then excused.

(Signed)

JACOB BETZ.

J. L. JONES, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Were you a member of the city council of the city of Walla Walla in 1892?

Answer. Yes.

Question. Were you a member of the fire and water committee?

Answer. Yes, sir.

Question. Did that committee negotiate with the board of directors of the Walla Walla Water Company for an extension of mains?

Answer. It did, sir.

Question. What occurred at that meeting?

Answer. The chief engineer recommended that we get better service or have more mains put in.

(Counsel for complainant objected to this last question, on the ground that it is incompetent, irrelevant, and immaterial, and moved that portion of the answer be stricken out as not responsive to the question and as hearsay.)

Answer. He also recommended that a main be laid down Chestnut street; and I don't know, but I understood the chairman of the fire and water committee to tell me that he had seen the water company in regard to this matter of mains and they wished to confer with us about laying those pipes.

339 (COUNSEL FOR COMPLAINANT: I also object to that portion of the answer as hearsay and not responsive to the question and move that it be stricken out.)

Answer. I was notified that the officers of the water company requested us to meet them on a certain day, I can't state positively what time, whether it was in August or July, at their office, and we met them there, and Mr. Moore stated the reasons for calling us there. He said the mayor had taken quite a stand in the matter of the city owning its own water works and he would like to know what action the council was going to take in this matter. He said he didn't feel like laying any more pipes; he would rather save his money and fight the city. I said to him, as far as that was concerned, we were there as a committee and not personally, and we didn't feel like discussing the matter there and requested them to have a pipe laid on Third street to the city hall and a fire-hydrant placed there.

Question. Do you know whether this request or any portion of it was complied with?

Answer. I don't know positively, but I understood they laid a pipe on Chestnut street, but the one to the city hall has never been put in.

Question. Do you know whether the board of directors took any action or not?

Answer. They voted on the matter at the time, and the president of the company stated that he favored having the pipe laid, and they agreed at that time to have it laid.

Cross-examination:

Question. Are you sure exactly as to what Mr. Moore said at that meeting?

Answer. That is as near as any man could tell. No man could tell positively without taking it down.

Question. Wasn't what he said to this effect: that if the city proposed to render the plant valueless by this new contract that they proposed to let he intended to use his money for fighting it?

340 Answer. I didn't understand it that way.

(Witness excused.)

(Signed)

J. L. JONES.

PHILLIP J. YENNEY, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Where do you reside?

Answer. At the upper end of town, in Reed's addition.

Question. In Walla Walla city?

Answer. Yes, sir.

Question. How long have you resided there in the city?

Answer. Six or seven years.

Question. Are you a tax-payer, Mr. Yenney?

Answer. Yes, sir.

Question. How large a house have you there?

Answer. It is a two-story building.

Question. Are there many houses surrounding you in your immediate neighborhood?

Answer. There are some houses around me.

Question. State if you are able to get water into your house.

Answer. There is no water there but to sprinkle with in my yard, and about five feet high in my house. It run into one bath-room, but in the kitchen I haven't any.

Question. You have no water in your kitchen at all?

Answer. No.

Question. Are there any pipes in your house?

Answer. No; not that far.

Question. Has the water not sufficient force to run into your house?

Answer. No.

Cross-examination :

Question. You live in Reed's addition.

Answer. Yes.

Question. How high is your house compared with the altitude of the reservoir?

341 Answer. I don't know.

Question. Is it about on the same level?

Answer. About, I think, on the same level.

Question. How near the reservoir?

Answer. About half a mile.

Question. The town gradually slopes down from the reservoir—the general lay of it?

Answer. Yes, sir.

Question. So the highest part of the city is near the reservoir?

Answer. Yes; it is level up there.

Question. Did you ever have any conversation with any of the agents of the water company with reference to the supply of water in that neighborhood before you built your house?

Answer. Oh, yes, sir.

Question. I will ask you what talk you had.

Answer. They told me they didn't think that I could get water, I was too close to the fountain.

Question. Haven't you got any water since building your house?

Answer. Oh, yes.

Question. And for sprinkling?

Answer. Yes.

Question. And to use downstairs?

Answer. No; only in one bath-room. It comes about five feet high, and in the kitchen it wouldn't run.

Question. Why do you need it five feet high in your kitchen?

Answer. The kitchen is higher.

Question. Is the kitchen higher than the bath-room?

Answer. Yes, sir.

Question. How high is the foundation of your house?

Answer. About four feet.

Question. Now, are the houses in your immediate neighborhood below or above you?

342 Answer. Some of the houses are below me.

Question. Are any above you?

Answer. Not right where I live.

Redirect examination :

Question. Are there not quite a number of houses on a direct line with you back on Whitman street?

Answer. Yes; on each side.

Question. And some on Whitman street are much higher, too?

Answer. That street that runs up to Zaring's?

Question. Yes.

Answer. Yes; it runs out to the city limits.

Question. Are there many houses there?

Answer. Yes; quite a number.

Question. When were those houses built?

Answer. They must have been there the last four or five years.

Question. Were two of those houses built within the last year?

Answer. Where I live—I built my house last year.

Question. Are there not two others on Whitman street?

Answer. Yes; I think there was.

Question. How many other houses are there on the same elevation with you?

Answer. I can't tell; I don't know their elevation.

Question. Can't you give some idea?

Answer. They are not quite on a direct line with me.

Question. What do you mean by different line—lower?

Answer. Well, I think they are more south of me; it looks like about eighty rods.

Question. You don't know of your own personal knowledge as to the supply of those houses?

Answer. No, sir.

(Witness excused.)

(Signed)

PHILIP YENNEY.

343 NELSON CASTLEMAN, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Give your full name.

Answer. Nelson Castleman.

Question. Do you reside in Walla Walla, Mr. Castleman?

Answer. Yes, sir.

Question. How long have you resided there?

Answer. Seventeen years.

Question. What portion of the city do you reside in?

Answer. In Chase's addition, on Chestnut street.

Question. Have you water for your house, Mr. Castleman?

Answer. Yes, sir.

Question. How long have you had a supply of water in your house?

Answer. I got water in there about three or four years ago.

Question. State how you got that water—what arrangements you have with the company.

Answer. Mr. Retzer made the arrangements.

Question. Who made the arrangements?

Answer. Mr. Retzer.

(COUNSEL FOR COMPLAINANT: I object to any testimony on that point, on the ground that so far as this witness is concerned it is hearsay.)

Question. Did Mr. Retzer, you, and some others go into a partnership?

Answer. Five of us had to go in for one hundred dollars before they would run the main up.

Question. Did you pay your portion of the one hundred dollars?

Answer. I did—twenty dollars. They gave me credit for it.

Question. How much and how large a pipe did they put in?

Answer. I think it is a two-inch pipe, and it runs about six hundred feet from Chase avenue up to Fourth street.

Question. Is it laid in the street on Fourth street?

344 Answer. On Chestnut street.

Question. State who is the owner of that two-inch main now.

Answer. The water company.

Cross-examination :

Question. Has that ever been paid for yet?

Answer. Pretty well.

Question. When was your house built?

Answer. One two years ago, and the other was moved there about four years ago.

Question. Was yours the first built in that locality?

Answer. No, no; there were several houses around there.

Question. About how many?

Answer. Three, four, or five; somewheres along there.

Question. Were all the people who have houses in that neighborhood interested in that arrangement?

Answer. Five of us. Four of us had to pay for it. One man wouldn't put up the money.

Question. Four of you built this main?

Answer. The company put it in for us.

Question. For you?

Answer. For our benefit.

Question. You say the company own it. How do you know the company own it?

Answer. Because they gave us our money back in water—twenty dollars apiece.

Question. How long was this pipe which you built and connected with the main of the company?

Answer. About six hundred feet, I should judge; along one block.

Question. One block?

Answer. One block, I think, is a little over six hundred feet; I don't know how much.

Redirect examination :

345 Question. Did you ever make any effort, Mr. Castleman, personally to have the water company put that main in originally?

Answer. No, sir; I never did.

(Witness excused.)

(Signed)

NELSON CASTLEMAN.

HENRY RETZER, being recalled as a witness on the part of defendant-, testified as follows :

Question. You heard the testimony of Mr. Castleman ?

Answer. I did.

Question. You live in the same neighborhood of Mr. Castleman ?

Answer. Not at the present time. I made arrangements with the water company or with Mr. Bowman.

Question. You made those arrangements of which Mr. Castleman spoke ?

Answer. Yes.

Question. State what arrangement you made.

Answer. The water company wanted one hundred dollars to lay a pipe from Chase avenue up to the center of Fourth and Chestnut street. I seen Mr. Bowman about it, and he said it was a go.

Question. Who was Mr. Bowman ?

Answer. He was connected with the water company at that time.

Question. Was he their superintendent ?

Answer. He was superintendent at the time, I guess. I went to Mr. Castleman and asked him, and he paid twenty dollars. A man named Stone paid twenty dollars. I had to pay forty dollars, and a man by the name of Lawrence paid twenty. Mr. Boyer wouldn't pay anything towards it. I paid the other twenty.

Question. You turned all the money over to the water company ?

Answer. Certainly.

Question. Who is the owner of that pipe now ?

Answer. I guess the company is.

Question. How large was the pipe ?

Answer. It was a two-inch pipe laid from Chase avenue to Fourth street, on Chestnut street.

346 Question. Were you the first one to make an effort to have the water company put this pipe in ?

Answer. Yes ; I asked them if they wouldn't do it for that.

Cross-examination :

Question. Have you any particular feelings against the water company ?

Answer. Not at all.

Question. Did you ever have ?

Answer. No ; I wouldn't patronize them if I did.

Question. Then you think it was perfectly reasonable that they wouldn't put in the main ?

Answer. I don't think that was reasonable, one hundred dollars for laying the pipes.

Question. How many use this pipe that was attached to the main ?

Answer. It runs from Chase avenue to Fourth and Chestnut street, a little over six hundred feet. It is over a block.

Question. How long are the blocks in that neighborhood ?

Answer. This was exceptionally long, because Chase avenue runs in a different direction. It is over a block.

Question. You have had a good supply of water since that pipe was laid?

Answer. A fair water supply for ordinary use. We are restricted. They shut it off several times.

Question. You have enough for sprinkling purposes?

Answer. No; hardly enough water for the house.

Question. Hardly enough for the house?

Answer. Hardly enough. My brother hasn't enough at present. If he was here, he could say the same.

Question. You are not testifying for your brother at present.

Answer. I am testifying for myself. There was hardly sufficient water for a bath-tub—to take a wash.

Question. How large is your lot?

Answer. It is 65 x 120 feet, I guess.

347 Question. It is a pretty nice lot, isn't it?

Answer. Yes.

Question. Trees grow nicely?

Answer. Yes.

Question. Are there any flowers?

Answer. Yes; there are flowers there, too.

Question. It is a pretty nice place?

Answer. It is a pretty nice place; yes.

(Witness excused.)

(Signed)

HENRY RETZER.

MEZER BAILEY DWELLY, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Do you reside in Walla Walla?

Answer. Yes, sir.

Question. How long have you resided there?

Answer. A little over two years.

Question. Are you a tax-payer of the city?

Answer. Yes, sir.

Question. Have you been during all that time?

Answer. Yes, sir.

Question. What portion of the city do you reside in, Mr. Dwelly?

Answer. On the corner of Eighth and Poplar street.

Question. Is that quite a thickly populated section of the city?

Answer. Yes, sir.

Question. State, Mr. Dwelly, what has been the nature of your water supply during the last few years; whether or not it has been adequate.

Answer. Up to this last year, so far as irrigation went, I was short of water. For the last five years I don't remember so distinctly, but from five years up to this time or up to 1894 I was short of water, so far as irrigation went.

348 Question. You mean you are short, not having enough to irrigate and keep your lawn up?

Answer. Yes, sir.

Question. Have you ever made any complaint to the water company about being short of water?

Answer. I have.

Question. And they didn't increase your supply until this last year?

Answer. No, sir.

Question. Have you water in your house?

Answer. I have.

Question. Were you able to get water in your house?

Answer. Yes, sir.

Question. But not for irrigation?

Answer. Not sufficient; I could get some.

Question. You reside in the lower part of the city, do you not?

Answer. Yes, sir.

Question. Near the end of the main?

Answer. Well, yes.

Question. Have you heard much complaint among your neighbors of the inadequacy of water supply?

(This question was objected to by counsel for complainant on the ground that such testimony would be hearsay.)

Answer. Yes, sir.

Question. There has been a great deal of complaint, has there?

(This question was objected to by counsel for complainant on the same grounds as above, and also on the further ground that it is leading.)

(Question not answered.)

Cross-examination:

Question. Is your lawn higher than your house, Mr. Dwelly?

Answer. No, sir.

Question. It is lower, is it?

Answer. Yes, sir.

349 Question. Did you put in your connection with the main for the water company?

Answer. The water company put it in for me.

Question. Under your directions?

Answer. Yes, sir.

Question. Have you never had a lawn until this last year on your place?

Answer. Yes; I have had it ever since I have been there; I think in 1884.

Question. How did you water your lawn?

Answer. With that water I have from the water company.

Question. Has your lawn improved very much during the last year?

Answer. Well, no, sir.

Question. You have always had a good lawn there, have you?

Answer. Yes, sir; very good.

Question. Have you flowers?

Answer. No; not very extensive flowers.

Question. Did you try to raise any flowers?

Answer. No, sir.

Question. Have you been prevented from doing it?

Answer. No, sir.

Question. Have you any trees?

Answer. Yes, sir.

Question. Do your trees grow well?

Answer. Yes, sir; they grow well.

(Witness excused.)

(Signed)

M. B. DWELLEY.

OLIVER P. BARKER, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Do you reside in Walla Walla?

Answer. I do.

Question. How long have you resided there?

Answer. Five years, I think.

350 Question. Are you a tax-payer in Walla Walla?

Answer. Yes, sir.

Question. Where do you own property?

Answer. On Main street above the bridge.

Question. What is the nature of that property?

Answer. It is a brick building, two stories high.

Question. You are the owner of that at the present time?

Answer. Yes, sir.

Question. Have you pipes laid for water in that building?

Answer. I have some; yes, sir.

Question. State if you have been able to get an adequate supply of water.

(This question was objected to by counsel for complainant, on the ground that it is leading, and also that it is incompetent, irrelevant, and immaterial.)

Question. Well, there is a pipe laid for water in the upper story and two water-closets and there is a little water flows in the upper story, providing the water-closets are not in use. If they are in use, the water won't go at all in the faucet by the sink.

Question. How long has that been the condition?

Answer. All the time since the building was built until this year, which is not water enough to do very much good.

Question. It is not as much as you would want?

Answer. No; it is not enough in the upper story to use to good advantage.

Question. Has there been any change in the water works system since last year?

Answer. Not that I know of.

Question. You don't know?

Answer. No.

Question. You have been at all times prepared to pay for an adequate supply of water in your buildings, have you?

Answer. Yes, sir.

Question. State if you know that the present year of 1894
351 has been a particularly rainy season.

Answer. I think so.

Question. You have been a resident of Walla Walla county a good many years, have you?

Answer. Eighteen years; yes, sir.

Question. You are pretty well acquainted with the nature of the country?

Answer. Yes, sir.

Question. And with the nature of the water flow of springs?

Answer. Yes, sir.

Question. Than during a usual season?

Answer. Yes.

Cross-examination:

Question. Where is your building located—on what street?

Answer. On Main street.

Question. How far up Main street?

Answer. Well, it is the first brick building above Main Street
bridge.

Question. How large is your building?

Answer. It is a two-story building, fifty foot front.

Question. How many service pipes are connected with the main?

Answer. Two; one on the upper story and one on the lower
story.

Question. Is there any difficulty with the water supply in the lower story?

Answer. No, sir.

Question. On the upper story you have no difficulty excepting when the water-closets are in use?

Answer. If the water-closets are not in use, they can only get a weak stream then, and if the water-closets are in use they can get no water.

Question. You say you have two service pipes, one for the upper and one for the lower story?

Answer. Yes, sir.

352 Question. With which one of the service pipes are the water-closets connected?

Answer. With the pipes in the upper story. The water-closets are in the upper story. The one that goes to the upper story connects with the water-closets on the upper story and also runs to the sink, and when they are using the water-closets none runs to the sink in the upper story.

Question. Do you mean that you can't use it at all—it don't run at all?

Answer. This year some runs, but last year none run at all.

Question. It is no great inconvenience in not getting water in the sink while the water-closets are in use, is it?

Answer. Yes; I think so.

Question. What proportion of the time are the water-closets in use?

Answer. I declare I don't know. There are fifteen rooms *rooms* up there, and the occupants go to the water-closets occasionally.

Question. Don't the water run in any of those rooms when the water-closets are in use?

Answer. There is only one faucet up there.

Question. In what room is that one faucet?

Answer. It is in the hallway. They get water from that faucet.

Question. Does that water-closet run all the time or is it self-closing?

Answer. It runs only when it is used. It is self-closing.

(Witness excused.)

(Signed)

O. P. BARKER.

DION KEEFE, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Do you reside in Walla Walla, Mr. Keefe?

Answer. Yes, sir.

353 Question. How long have you resided here?

Answer. Something over twenty years.

Question. Are you a tax-payer in Walla Walla city?

Answer. Yes, sir.

Question. Have you been a tax-payer all that time?

Answer. Yes, sir.

Question. In what portion of the city do you reside?

Answer. On the corner of Main and Touchet, in Cain's addition.

Question. Do you get your water supply from the water company?

Answer. Yes, sir.

Question. What has been the nature of your water supply during the last two years?

Answer. Before up to this year, as far as I can recollect, there have been times in the year when there has been very little water.

Question. What times in the year?

Answer. During the sprinkling season, along in July and August.

Question. Has that occurred each year up to the present year?

Answer. It has at least for the last three years.

Question. Have you been unable to get water for sprinkling purposes?

Answer. I got very little water. On one or two occasions I got none at all.

Question. Was there much force to the water when you got it?

Answer. Not very much.

Question. Is there much force to it now?

Answer. Not a great deal.

Question. You say you have had more water **this year** than before **this year**?

Answer. Yes.

Question. Are you acquainted with the nature of the rainfall of Walla Walla county?

354 Answer. Somewhat; yes, sir.

Question. You have resided here for twenty years?

Answer. Yes, sir; a little over.

Question. Hasn't this last year of 1894 been a particularly rainy season?

Answer. I think we have had more snow and rain than we have had for the last three or four years prior to this.

Question. In your experience with the nature of springs, do you think they would materially increase after a considerable snow in the winter and a rainy spring?

Answer. Yes, sir.

Question. You think the flow would be much stronger during the summer time?

Answer. Yes; I do.

Cross-examination:

Question. Have you any interest in this action at all?

Answer. No, sir.

Question. You don't care which side wins?

Answer. Why, no.

Question. Wouldn't it help your business, though, if the city should win this suit?

Answer. I don't think it would.

Question. Haven't you ever made the remark that you would like to see the city win?

Answer. I thought it ought to put in electric lines.

Question. And that it would give you a chance for contracts?

Answer. No, sir; I never made any mention of that thing at all.

Question. When do you call the sprinkling season?

Answer. May, June, July, and August.

Question. It is only in those months that you have any complaint as to the inadequacy of water supply?

Answer. That is the time I have been short of water.

355 Question. Have you had plenty of water for sprinkling purposes this year?

Answer. Not all the time.

Question. You keep your place in pretty good condition and have a lawn, trees, etc.?

Answer. I try to; yes.

Question. You are well supplied with water over this place?

Answer. Certainly.

Question. You don't get water from outside sources?

Answer. No, sir.

Question. There are certain hours of the day in which your sprinkling is done?

Answer. Yes, sir.

Question. And during the rest of the day you are well supplied with water for domestic purposes?

Answer. Yes.

Redirect examination :

Question. Is it not a fact that much more labor is required to keep your lawn sprinkled when the force is weak ?

Answer. Yes, sir ; it is.

Recross-examination :

Question. What force do you use in sprinkling ? You answered that it required more force.

Answer. Well, you have to shift your sprinkler a good deal oftener and keep pulling it around.

Question. That don't require much labor, does it ?

Answer. It requires attention paid to it and time.

Question. That is all it takes—time and attention ?

Answer. Yes ; attention and time.

Question. You have a man to do it at your place ?

Answer. No, sir ; I do it.

Question. At your own convenience or the convenience of your family ?

356 Answer. Sometimes I have a hired man around there, and if he isn't there I do it.

Question You didn't lower his wages when you didn't have a water supply ?

Answer. That wasn't taken into consideration.

(Witness excused.)

(Signed)

DION KEEFE.

THOMAS QUINN, being first duly sworn as a witness on the part of defendant-, testified as follows :

Question. You reside in Walla Walla city, Mr. Quinn ?

Answer. Yes, sir.

Question. What portion of the city do you reside in ?

Answer. On Rose and Colville.

Question. How long have you resided in Walla Walla city ?

Answer. Thirty years.

Question. You are a tax-payer, are you ?

Answer. Yes, sir.

Question. You have a house on Rose and Colville street ?

Answer. Yes, sir.

Question. How large a house is that ?

Answer. Well, it is a two-story house.

Question. Are there quite a number of buildings in your immediate neighborhood ?

Answer. It is a pretty thickly settled portion of town.

Question. What is the nature of the buildings ?

Answer. They are all wooden buildings.

Question. Are they all residence buildings ?

Answer. Yes, sir.

Question. Have you water pipes laid to your house and into the second story ?

Answer. Yes.

Question. State whether or not you have been able to get water there.

357 Answer. Sometimes I haven't been able to get water in the upper story at all.

Question. During what seasons of the year?

Answer. Generally through the sprinkling season.

Question. What time is that?

Answer. May, June, July, and August.

Question. Have you been able to get water up there so as to be of any use to you during that season?

Answer. Well, no. I have very little water up there. It is pretty high.

Question. You say you have water pipes laid all through your house?

Answer. Yes.

Question. Have you a bath-tub upstairs?

Answer. No.

Question. Have you any water-closets upstairs?

Answer. No.

Cross-examination :

Question. It is only in the sprinkling season that you have this difficulty?

Answer. That is all.

Question. And during the sprinkling hours?

Answer. That is all; whenever the sprinklers are running I can't get water for the house.

Question. Your own sprinklers?

Answer. Yes.

Question. When you turn off your own sprinklers you have sufficient water in your house?

Answer. Yes.

Question. You have only one service pipe that furnishes water for sprinkling and domestic purposes in your house?

Answer. Yes.

Question. Did you put in the service pipe?

Answer. Yes.

358 Redirect examination :

Question. There have been times that you have not been able to get the water?

Answer. Yes.

Question. Is the force of the water very strong in the second story of your house?

Answer. No.

(Witness excused.)

(Signed)

THOMAS QUINN.

A. J. YORK, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla, Mr. York?

Answer. Yes, sir.

Question. What is your business?

Answer. I am janitor of the Baker school.

Question. How long have you occupied that position?

Answer. Eleven years.

Question. What is this Baker school built of?

Answer. It is a two-story brick building with a basement.

Question. It is a public school?

Answer. Yes, sir; it is a public school.

Question. State whether or not there are water pipes running through the building, Mr. York.

Answer. Yes, sir.

Question. What has been the nature of the water supply to that building—good or otherwise—during the last two years that you have been janitor?

Answer. It has never been so it would run in the upper story during the last three years until this year.

Question. Does it run freely now?

Answer. No.

Question. Describe how it comes out of the faucet on the second floor.

359 Answer. On the second floor?

Question. Yes; if it comes out with any force.

Answer. It just barely runs, and won't run at all when it is open in the basement, on the second floor.

Question. It is simply impossible to draw water on the second floor, is it?

Answer. I carried water up on the second floor to scrub with for two or three years until this last year, when I got a hose and attached it to the pipe and run up on the balcony.

Question. Would that present supply of water be of any use in extinguishing a fire?

Answer. I don't think it would.

Question. There was a fire at the Baker school since you have been janitor there, has there not?

Answer. Yes, sir.

Question. In what portion of the building was the fire?

Answer. It started in the west or north side and run into the bellfry.

Question. Did they use any water from the building there to extinguish it?

Answer. No; I believe they carried up a bucketful or two from the basement.

Question. It takes considerable time to draw a bucketful on the second floor, does it?

Answer. About four minutes on the first floor, and on the second

floor I don't know how long it would take. It takes about five minutes to draw a cupful, if all the faucets were closed.

Question. If open, how long would it take?

Answer. Well, you wouldn't never get it.

Cross-examination:

Question. What particular use have you for water on the second floor?

Answer. For drinking purposes.

Question. For the pupils?

360 Answer. Yes, sir.

Question. They can drink just as well on the first floor as on the second floor, can't they?

Answer. Yes; if they go down there.

Question. You described the connection of this hose with the water supply on the first story. You got plenty of water by means of that connection, did you not?

Answer. It runs so I keep a wash-tub up there and get that full.

Question. In what length of time?

Answer. I don't know.

Question. In a short time?

Answer. Probably fifteen minutes.

Question. It didn't take as long as that, did it?

Answer. Yes; to run the wash-tub full.

Question. For scrubbing purposes?

Answer. For scrubbing purposes.

Question. That is the only purpose you use water for on the second floor?

Answer. Except for drinking.

Question. Have you ever made complaint about the water supply to anybody?

Answer. No, sir.

Question. Do you know of any complaint being made to the city or anybody else on account of the insufficiency of the water supply?

Answer. No.

Question. You don't know whether it has ever been brought to the attention of the water company or not?

Answer. No.

Question. State whether the flow is more free by means of a hose than by means of the pipe connection.

Answer. It runs better when connected with the floor below than when connected with the upper story.

Question. Who put in the service pipes and connections
361 between the school and the main?

Answer. I can't tell you.

Question. You don't know how they were put in?

Answer. The pipe was laid into the building when I went there, and I think that Mr. Bowman put in the wash-basins and the pipes running to the first floor and the second floor.

Question. Do you know anything about it?

Answer. No.

Question. How high is the school building compared with the reservoir?

Answer. Well, I can't say; that is something I have never paid any attention to.

(Witness excused.)

M. McCARTY, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla, Mr. McCarty?

Answer. Yes, sir.

Question. How long have you resided in Walla Walla?

Answer. I have been living in the city fifteen years.

Question. Are you a tax-payer of the city?

Answer. Yes, sir.

Question. Have you been during all that time?

Answer. Yes, sir.

Question. In what portion of the city do you reside?

Answer. I now live at the corner of Idaho and East Main street.

Question. Are you a subscriber to the Walla Walla Water Company?

Answer. Yes.

Question. What has been the nature of your water supply since you have resided there?

Answer. This year it has been very good. Last year it wasn't quite so good. The year before, in the summer months, it stopped entirely some days.

362 Question. So that you had no water at all?

Answer. No.

Question. For domestic purposes?

Answer. No.

Question. Do you get your water for domestic purposes from the water company?

Answer. Yes, sir.

Cross-examination:

Question. In what part of the town is this place?

Answer. It is on the upper end of Main street, practically at the end of the residences.

Question. Are you near the reservoir?

Answer. No. I can't describe it very well to you.

Question. Now, when you say two years ago or three years ago there was practically no water, do you mean for all purposes?

Answer. Yes, sir. Some days we had to take a pitcher and go and get drinking water.

Question. Where did you get water?

Answer. At my neighbor, Mr. Berry's, who lives behind me.

Question. Do you know the cause of improvement in the supply?

Answer. I don't know. I think there has been some new pipe laid. I mean there has been some improvement in the system.

Question. In your locality?

Answer. Somewheres along Boyer avenue, I think, some pipes were laid.

Question. After those pipes were laid were you well supplied with water?

Answer. Yes; I have a good supply this year.

Question. The year before?

Answer. Last year there was a short season we were scarce of water.

Question. During the sprinkling season and during the sprinkling hours?

Answer. Yes, sir.

363 Question. That is to say, when your sprinkler was running you couldn't get sufficient water for domestic purposes?

Answer. That was the case three years ago.

Question. At present you have plenty?

Answer. It is doing very nicely now.

Question. Do you know whether any new mains or pipes have been laid in that part of the city during the last three years?

Answer. I am under the impression that there have been.

Question. You haven't raised or lowered your house during the last three years?

Answer. No; it was built four years ago.

Question. You have a nice lawn, trees, etc.?

Answer. Yes.

Question. Your place is in good condition?

Answer. Yes, sir.

Question. And all are growing well?

Answer. They are doing nicely; yes.

Question. How many service pipes have you for your two houses up there?

Answer. We have one pipe that answers both houses.

Question. Of what size?

Answer. I really don't know. They laid that before I started to building.

Redirect examination:

Question. You say you have had plenty of water during the last year for irrigation purposes?

Answer. Yes; but there hasn't been any great amount of pressure.

Question. How much force have you there?

Answer. I couldn't tell you this year. From the fact that my hose is a little out of repair I wouldn't be able to say whether I was getting the full extent or not. Last year I had good hose and the pressure wasn't very heavy.

Question. You confine yourself to sprinkling during the hours ruled by the company, do you?

364 Answer. I don't really know.

Question. Do you find it necessary, in order to keep your lawn in good condition, to sprinkle more than the time given you?

Answer. Probably it was neglect on my part in allowing it to run.

Recross-examination:

Question. There are no restriction of hours in your district, is there?

Answer. I believe there is a published restriction.

Question. You don't know what that is?

Answer. Now I think it is from four to nine in the afternoon.

Question. Last year your water supply was not good?

Answer. Not quite as good as this year.

Question. Was your lawn good?

Answer. Yes.

Question. You must have sprinkled your lawn more hours than this year?

Answer. I can't tell. Sometimes we didn't turn it off.

Question. The year before?

Answer. The year before at eight o'clock in the morning my house service and all service run entirely dry.

Question. Three years ago?

Answer. Then until nine o'clock I didn't really have any more water whatever. We used to have a large wash-tub under the pipe and we could store enough water for wash purposes, and we depended upon our neighbors for drinking water.

Question. Didn't you irrigate your lawn?

Answer. During a couple of months there were times that there was enough water.

Question. The water company never turned the water off for you, did they?

Answer. No; it has always treated me very well.

(Witness excused.)

(Signed)

M. McCARTY.

365 NATHANIEL WEBB, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla, Mr. Webb?

Answer. Yes, sir.

Question. How long have you resided here?

Answer. About ten years.

Question. Are you a tax-payer?

Answer. Yes, sir.

Question. What portion of the city do you reside in?

Answer. Down in the Fourth ward, on North Seventh street.

Question. There — quite a number of buildings in that neighborhood—it is quite thickly settled, is it not?

Answer. Yes, sir.

Question. Have you a water supply running into your house?

Answer. Yes, sir.

Question. Are you supplied with water pipes?

Answer. Yes, sir.

Question. From the main of the water company?

Answer. Yes, sir.

Question. When was that main laid?

Answer. Last spring.

Question. Do you know the circumstances under which it was laid?

Answer. Well, the company extended it from their main line opposite my residence—probably thirty or forty feet.

Question. At whose request?

Answer. At my request.

Question. Who paid for it, Mr. Webb?

Answer. The contract was I paid for the pipe, but they furnished me water in the place of it.

Question. To whom does this forty feet of pipe belong now?

Answer. I presume it belongs to the company.

Question. Did you request the water company to put it in?

366 Answer. Yes, sir.

Question. Did you request them to put it in and you would pay for it yourself?

Answer. No; I didn't ask them. It was their proposition and I accepted it, to put it in, and the- paid me for it in water.

Question. What is the size of this main down in front of your house?

Answer. I don't recollect.

Question. Isn't it a two-inch main?

(This question was objected to by counsel for complainant, on the ground that it is leading.)

Answer. I am not certain about the size of the main.

Question. Does it furnish a sufficient supply of water?

Answer. Yes.

Cross-examination:

Question. How long have you had this supply?

Answer. The pipe was put in last spring.

Question. You were perfectly satisfied with that proposition?

Answer. Oh, yes.

Question. You never expected them to lay a pipe to your house without any compensation?

Answer. No; I didn't ask them.

Question. You don't think that would be reasonable?

Answer. I supposed they had their reason for it.

Question. How long have you lived in that neighborhood?

Answer. Ten or twelve years.

Question. It has only recently been settled up?

Answer. Oh, no; it has been settled a long time.

Question. I mean thickly settled.

Answer. It has gradually improved and increased like other parts of the town.

Question. Have you any personal knowledge as to the supply in that neighborhood, in regard to other people?

Answer. Well, yes, sir.

Question. How is the supply?

367 Answer. For the past year it is satisfactory. I have heard no complaints.

Question. Do you know how it has been the past year, of your own personal knowledge?

Answer. No more than previous to the present year there has been come complaint about the scarcity of water.

Question. Only during the sprinkling season?

Answer. Yes, sir.

Question. You don't know whether the people of that district have observed the regulations of the company with reference to sprinkling?

Answer. No; I do not.

Question. Do you know whether the sprinkling hours starts at five o'clock in the afternoon?

Answer. I don't know.

Question. Do you know whether such complaint as you have heard were complaints made by people who didn't observe the sprinkling rules?

Answer. I don't know.

Redirect examination :

Question. This place where you reside is in the lower end of the city, directly under a main, is it not?

Answer. Yes.

Question. You say you don't know the size of the main they laid in front of your house?

Answer. No, sir.

Question. You don't know whether it is a four-inch main or not?

Answer. I don't think it is a four-inch main. I never observed it.

(COUNSEL FOR COMPLAINANT : I will object to that question on the ground that it is leading.)

Question. Don't you know that it is an inch and a quarter main?

Answer. No; I don't know the size of it.

368 Recross-examination :

Question. Are you sure that the water company laid this main and did the connecting for you, or didn't you have a contract with Mr. Bowman personally for the laying of the main, and have your dealings with him?

Answer. Well, yes; I had my dealings with him, but I supposed he represented the water company.

Redirect examination :

Question. You didn't obtain any franchise from the city to lay a pipe there, did you?

Answer. No, sir.

(Witness excused.)

ANDREW J. EVANS, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Where do you reside, Mr. Evans?

Answer. On East Main street and Touchet.

Question. How long have you resided there?

Answer. Seven years.

Question. You are a tax-payer, are you?

Answer. Yes, sir.

Question. Do you obtain water from the Walla Walla Water Company?

Answer. Yes, sir.

Question. For irrigation and domestic purposes?

Answer. Yes, sir.

Question. What has been the nature of your supply, adequate or inadequate, during the past two or three years that you have lived there?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. This last year the supply has been very good. The year previous to that it was inadequate.

Question. Well, in what does its inadequacy consist?

Answer. In regard to sprinkling my lawn. Sometimes the water wouldn't only run to my kitchen for domestic purposes.

369 Question. During what seasons of the year?

Answer. During the last two seasons it has been weak in my kitchen while sprinkling the lawn.

Question. How does it run—with any force?

Answer. With very little force.

Question. It takes considerable time to draw any amount of water in the kitchen?

(This question was objected to by counsel for complainant, on the ground that it is leading.)

Answer. The supply, of course, is weak up there.

Question. Do you know whether or not, Mr. Evans, the irrigating on the other side of the street affects the flow of water in your yard?

Answer. A little; yes.

Question. When the sprinklers are running across the street yours do not run as strong?

Answer. No; it don't run nearly as strong.

(Witness excused.)

(Signed)

A. J. EVANS.

ANDREW J. NEWTON, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla city?

Answer. Yes, sir.

Question. How long have you resided here?

Answer. Thirteen years.

Question. Are you a tax-payer?

Answer. I am.

Question. What portion of the city do you reside in?

Answer. 716 East Alder street—the upper portion.

Question. Are there many people residing in your vicinity?

Answer. There are quite a number of houses.

Question. There are houses all around you, are there not?

Answer. Yes, sir.

Question. Do you obtain water from the Walla Walla
370 Water Company?

Answer. I do.

Question. For domestic and irrigation purposes?

Answer. For domestic purposes. I do very little irrigating.

Question. What is the force of the water in your yard—large or
small?

Answer. Well, a year ago last summer it was very little. This
last season it has been better.

Question. Is it very strong now?

Answer. I don't know what you call very strong.

Question. You know what a strong force of water pressure
would be.

Answer. I think the faucet at my sink runs about a bucketful a
minute.

Question. How is it for sprinkling?

Answer. For what little sprinkling I have done it has been all
right. I haven't had any trouble this last summer.

Question. It is better than it was before?

Answer. Yes.

Question. There has been a good deal of rain this last winter and
spring?

Answer. Yes.

Question. More, hasn't there, that any time since you have lived
here?

Answer. Yes; more than usual.

Cross-examination:

Question. Have you ever tried to sprinkle before this year?

Answer. Yes; this last year.

Question. What did you mean to say—that there was very little
water for irrigation purposes?

Answer. Well, the lawn is very limited. I irrigate a few flowers
around the house.

Question. At present have you an adequate supply of water for
domestic purposes?

Answer. Yes.

371 Question. Did you have last year?

Answer. Sometimes it was short some portions of the day.

Answer. During irrigation hours—that is, from four to nine in
the afternoon—over there?

Answer. Yes.

Question. Outside of that you have plenty of water?

Answer. Yes.

Question. As much as you want?

Answer. Yes; as much as I want.

Question. You have enough for all practical purposes?

Answer. There is always some portion of the day that the water will run.

Question. That is the only time—during the sprinkling season and during the sprinkling hours—that you lack water?

Answer. Yes; during the sprinkling season.

(Witness excused.)

(Signed)

ANDREW J. NEWTON.

GEORGE LUDWIGS, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla, Mr. Ludwigs?

Answer. Yes, sir.

Question. You are a tax-payer in Walla Walla city?

Answer. Yes, sir.

Question. Where do you own property?

Answer. I own this property here.

Question. Do you own this building where we are now?

Answer. Yes, sir.

Question. Have you water from the water company's mains in this buildings?

Answer. Yes, sir.

Question. What is the character of the water supply here? Is it at all times sufficient for all purposes?

Answer. It has sufficient force at all times with the exception that when there is an engine attached to the hydrant at this corner here it has not.

Question. You have noticed the supply of water here at times when an engine was attached to this hydrant at the corner?

Answer. Yes, sir.

Question. What effect has that on the water supply?

Answer. I can't get any water out of our hydrant at all.

Question. Do you remember when the Mix building burned?

Answer. Yes, sir.

Question. Were you present in your building then?

Answer. Yes, sir.

Question. Where was the engine standing?

Answer. On the corner of Third and Main street.

Question. How far was the Mix building from this building of yours?

Answer. It was just across the alley.

Question. Was there any danger of your building burning at that time?

Answer. Not very much danger, because the wind didn't come this way.

Question. Was it pretty well heated up?

Answer. Yes; it was pretty well heated up.

Question. Did you make any attempt to get any water to wet down your building with?

Answer. Yes; I had a hose attached to the hydrant upstairs as well as downstairs and wasn't able to get any water out of it.

Cross-examination :

Question. You can ordinarily get water?

Answer. Oh, yes.

Question. You don't know whether or not this water supply was shut off by the city the day of the fire?

Answer. No.

Question. You don't know anything about it at all?

Answer. As soon as the engine stopped pumping, then we
373 could get water.

Redirect examination :

Question. You have noticed at other times when the engine was pumping it shut off the water supply, have you?

Answer. I don't know whether they ever had the engine attached to that hydrant since when I was present.

Question. This fire was directly across the alley?

Answer. Yes, sir.

Question. What was the nature of that building that was burning; was it a two-story wooden building close to the alley?

Answer. Yes.

Question. Was there any wood-work in the rear of the building?

Answer. At that time I had a wooden privy, and I tried to throw water on that and didn't succeed.

Question. You say you don't know whether the city shut off the water or not?

Answer. No.

Question. Don't you know that the city has no facilities for shutting off your water?

Answer. They could go into the building and shut it off.

Question. Can you shut it off in any other way?

Answer. They could shut it off at the sidewalk, but I don't think they did, because as soon as the fire-engine stopped pumping we could get water.

Question. You don't think anybody turned it off?

Answer. No.

Recross-examination :

Question. You were in the back of the building when you were trying to save it?

Answer. Yes; I was in the back of the building.

(Witness excused.)

(Signed)

GEORGE LUDWIGS.

GEORGE H. SNELL, being first duly sworn as a witness on the part of defendant-, testified as follows:

374 Question. Your residence is in Walla Walla city?

Answer. Yes, sir.

Question. What is your business?

Answer. Contractor.

Question. How long have you resided here?

Answer. Sixteen years.

Q. Are you a tax-payer here?

Answer. Yes, sir.

Question. In what part of the city do you reside?

Answer. 315 Washington street.

Question. Is it a portion of the city that is quite well settled?

Answer. Well, yes.

Question. Have you a water supply from the Walla Waller Water Company there?

Answer. I have.

Question. From what main does it come?

Answer. I think it comes up from the Howard Street main. It comes from Howard street and runs down Washington. I am down a piece back of that.

Question. How large a main is it?

Answer. I think it is a two-inch main.

Question. What were the circumstances under which this two-inch main was laid—who laid it?

Answer. The water company laid it. I paid for it and took it in water.

Question. Who owns it now?

Answer. I guess the water company does.

Question. You paid the water company for it?

Answer. I paid for the work and material.

Question. And then you get your water rent until it is paid for?

Answer. Yes, sir.

Question. And from that time the water company owned it?

Answer. Yes, sir.

375 Question. What has been the nature of your water supply?

Answer. Well, it has been very good—that is, with the exception of my hot-water system. It is not as good as it might be through the irrigating season.

Question. In what way is your hot-water system dependent?

Answer. On the pressure, I guess.

Question. Explain that fully, Mr. Snell, why it is that you can't get sufficient hot-water pressure.

Answer. If I am irrigating in front or if they are irrigating during the hot season, the hot water won't run. The boiler is probably too high. I am only about nine or ten feet lower than the reservoir.

Question. And you can't get sufficient pressure in the upper end of the boiler to make the hot water come out?

Answer. No.

Question. You say you have your boiler up too high?

Answer. Yes; my boiler is a little high. I can't get it as low as it ought to be. I put it as low as I can get it, but it is still too high. From the grade of the sidewalk it would be about seven feet to the top of my boiler.

Question. Does it extend lengthwise?

Answer. No; it is about four feet high.

Question. You have it as low as you could possibly get it?

Answer. Yes, and have it standing.

Question. You still have trouble with it?

Answer. Yes; during the irrigating season.

Question. During the summer months?

Answer. That is, from May to about September.

Cross-examination:

Question. That is, during the hours for irrigation?

Answer. Well, during those months it is pretty hard to get enough water; the people above me have very little water.

Question. Do you know that to be a fact?

Answer. I don't know it to be a fact. I know I can't get 376 water during those months.

Question. Even outside of the regular sprinkling hours do you sometimes have difficulty?

Answer. Yes, sir; during the heated term.

Question. You attribute your insufficient water supply during that season to the fact that the people are using the water for irrigation purposes, don't you?

Answer. Yes, sir.

Question. Is it not a fact that when you can't get water outside of the hours prescribed for irrigating that the people are breaking the rules of the company?

Answer. I don't know anything about that.

Question. Isn't it necessarily so?

Answer. I don't know.

Question. Do you know of your own knowledge that there are people in that neighborhood who use the water outside of the hours prescribed?

Answer. Up there where I live—no, sir; I do not. There has been no restriction on the people living in this neighborhood.

Question. For all other purposes you have plenty of water?

Answer. Yes, sir.

Question. You have a pipe connecting with the mains of the water company by which you are supplied with water?

Answer. Why, yes; I tap their main.

Question. That pipe that you described, how long is it?

Answer. I guess it is somewheres in the neighborhood of two hundred feet.

Question. In a direct line with the main?

Answer. Yes.

Question. On the same street?

Answer. No; I am back of the main. It comes from the main to me.

(Witness excused.)

(Signed)

GEORGE H. SNELL.

377 JOHN DOOLEY, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. What portion of the city do you reside in, Mr. Dooley?

Answer. I live on Second and Sumach street.

Question. You are a tax-payer of the city?

Answer. Yes, sir.

Question. You have a house on Second and Sumach street?

Answer. Yes.

Question. How large is that house?

Answer. It is a two-story house.

Question. Is it supplied with water pipe?

Answer. Yes, sir.

Question. Can you get water into the second story?

Answer. Not when I am irrigating.

Question. You can't get any water at all when you are irrigating?

Answer. No.

Question. Have you a bath-tub upstairs?

Answer. No.

Question. Have you any water-closet upstairs?

Answer. No.

Cross-examination:

Question. In the first floor have you an adequate supply?

Answer. Not in the hot weather.

Question. You live in about the highest part of the city, do you not?

Answer. No.

Question. Do you know any other residences in the city as high as yours?

Answer. The water won't run in the second story.

Question. Can you compare the altitude of your location with the location of the reservoir?

Answer. I must be a good deal lower than the reservoir.

378 Question. Do you know how much lower?

Answer. No; I don't.

Question. Are there any other houses of higher elevation than yours?

Answer. Not in that portion of the city.

Question. In any portion of the town?

Answer. Yes; Mr. Pain's building is higher, I think.

Question. Is that a three-story residence?

Answer. Three-story.

Question. You think that is higher?

Answer. Yes.

Question. You are not sure?

Answer. Yes.

Question. That is the highest building you know of in town?

Answer. Mr. Winans' building, I guess, is as high.

Question. Outside of those two buildings, you think your house is as high as any in town?

Answer. Yes.

Redirect examination:

Question. In answer to the question you referred to the height of your house—that is, from the foundation up; you didn't mean the elevation of the foundation, did you?

Answer. No.

Question. Now, don't you know it to be a fact that there are several blocks of houses between your house and Idaho street on a direct line with Rose street that are higher than your house—that is, the foundation is higher than your house?

Answer. Yes; the foundation is higher.

Question. You are on First street?

Answer. Yes.

Question. There are houses on First street higher than your house—that is, the foundation of them?

Answer. Yes.

Question. And on Spokane street they are still higher?

379 Answer. Yes.

Question. And on Colville street still higher?

Answer. Yes; still higher.

Question. And Palouse street is higher than that, isn't it?

Answer. Yes.

Question. And Tukanon is still higher than that?

Answer. Yes.

Question. And Idaho street is still higher than Tukanon?

Answer. Yes.

(COUNSEL FOR COMPLAINANT: I will object to all this testimony, on the ground that the questions are all leading.)

Question. On those streets I have named there are numerous residences?

Answer. Yes.

Question. All of which are on a higher elevation than yours?

Answer. Yes; they are on a higher elevation.

(Witness excused.)

CLARK H. BARNETT, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla city, Mr. Barnett?

Answer. Yes.

Question. How long have you resided here?

Answer. I think about four years.

Question. How long have you resided in the county?

Answer. Since 1877.

Question. You are a tax-payer in Walla Walla city?

Answer. Yes, sir.

Question. In what portion of the city do you reside?

Answer. I live on Lincoln street, near Grove.

Question. In what addition?

Answer. I think it is Roberts' addition; I don't remember.

Question. Do you take water from the Walla Walla Water Company for your domestic purposes in your house and for irrigation?

Answer. Yes, sir.

Question. How large a house have you?

380 Answer. It is a two-story house.

Question. Have you water pipes to your house?

Answer. Yes, sir.

Question. To the second story?

Answer. No.

Question. On what main?

Answer. I think it comes down Lincoln street and makes a turn and goes down Grove. It is a small pipe.

Question. Did you have anything to do with putting down that pipe?

Answer. The pipe was laid into the door yard before I bought the property. I had to attach to that pipe.

Question. What is the nature of your water supply?

Answer. For the house it is all right. When I built the house I calculated to put water in the upper story. When I had it tested I found it would not be satisfactory.

Question. Did you find it would be practicable or impracticable?

Answer. I thought it wouldn't be satisfactory. It would just go to the floor.

Question. Did you desire to have a water supply on the second floor? Did you care much about it?

Answer. I didn't care a great deal about it.

Question. It would be much more convenient to have it there, would it not?

Answer. Yes; it would be much more convenient. I will say right here that the water company told me that they were going to put in larger pipes, which they did. I haven't tested it since.

Question. You don't know whether it would be sufficient or not?

Answer. No; I don't.

Question. You reside in a neighborhood where there — quite a number of two-story buildings, do you not?

Answer. Yes, sir.

Question. You reside in the upper portion of the city, do
381 you not?

Answer. Somewhat, yes.

Question. You said this pipe that they put in was larger?

Answer. Yes; that is what they told me.

Question. You don't know whether there is any more pressure on it than there was before?

Answer. I did think the water for irrigation was somewhat stronger than it was, but I don't think so now.

Question. You don't notice any difference in the pressure?

Answer. No, sir.

Question. You have no particular reason for thinking that the water supply would be able to reach the second story of your house?

Answer. I haven't tested it since.

Cross-examination:

Question. You stated for domestic purposes. Is it the same for irrigation purposes—you have a good supply?

Answer. Yes; now.

Question. You now have for irrigation purposes?

Answer. Yes; this last two years we haven't lacked for water.

Question. This last two years you have no fault to find?

Answer. No.

Question. For the last six or seven years you have had a nice lawn?

Answer. Have only lived there four years last fall. Yes; fair; not so much as we thought we ought to have.

Question. You have a pretty place, nice lawn and trees?

Answer. Yes; reasonably nice.

(Witness excused.)

(Signed)

C. H. BARNETT.

PATRICK WALSH, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Give your full name, Mr. Walsh.

Answer. Patrick Walsh.

382 Question. Do you reside in Walla Walla, Mr. Walsh?

Answer. Yes, sir.

Question. How long have you resided here?

Answer. Four years next December.

Question. Do you pay taxes in the city?

Answer. Yes, sir.

Question. Do you get your supply of water from the Walla Walla Water Company?

Answer. Yes.

Question. What portion of the city is your house in?

Answer. On the northeast corner of Park and Craig street.

Question. You have water in your house as well as in your yard?

Answer. Yes.

Question. Well, do you get sufficient water?

Answer. Not for irrigating purposes all the time.

Question. What season of the year is it that you don't get enough for irrigation?

Answer. In the summer time.

Question. You don't get enough to keep your lawn in good order?

(This question was objected to by counsel for complainant, on the ground that it is leading.)

Answer. I have enough to keep it this year, because I got all the hours I want to use it in. But in 1891 and '2 and a portion of 1893 I didn't have water enough to keep my lawn in fix with the hours that I got for sprinkling. I can run but one sprinkler at a time, and that would run very slowly; it will just scarcely turn. If I put two on, then I would have no water in the kitchen at all until I would turn one of them off again, and I can't use the two sprinklers, because it wouldn't throw water two feet.

Question. When was that you speak of?

Answer. In the summer of 1891 and 1892 and for two or three months in the summer of 1893.

Question. How is the force now?

383 Answer. Just the same as it always was.

Question. Your sprinkler only throws a stream about two feet now?

Answer. With two sprinklers. With one sprinkler it has more force.

Question. How far would it throw a stream with one sprinkler?

Answer. I can't exactly say that, because I never measured it or took notice of it.

Question. With only one sprinkler it takes a great deal more time in moving it around than it would if you had two running?

Answer. If I had two it wouldn't hardly move at all.

Question. If you used two sprinklers it wouldn't cause you as much trouble to water your lawn, would it?

Answer. It wouldn't cause me so much trouble; no. It would take me at least eight or nine hours to sprinkle my yard with one sprinkler with the force that the water runs out.

Question. Are there many people living in your neighborhood, Mr. Walsh?

Answer. A good many.

Question. It is quite a thickly settled neighborhood, isn't it?

Answer. Well, a portion of it. On the south of it here it is nearly all vacant; on the north, east, and west it is pretty thickly inhabited.

Cross-examination:

Question. Did you ever complain to the water company about your water supply?

Answer. I did.

Question. When?

Answer. Several times. I complained to Mr. O'Donnell, who was then president of it, and to Mr. Turner there and to Mr. Bowman, their superintendent.

Question. Has the water company ever shut off your water supply?

Answer. No; they never have.

Question. Haven't you always had a nice lawn on your
384 place and trees, etc., within the last three or four years?

Answer. Well, tolerably nice.

Question. It has always been a pretty nice looking place, hasn't it?

Answer. Yes, sir.

Question. You have always taken pride in it and kept quite a nice place there?

Answer. Yes.

Question. To do that you had to sprinkle out of the regular hours prescribed by the water company two or three years ago?

Answer. No; I didn't sprinkle outside of the regular hours two or three years ago or any other time.

Question. In spite of that, you have kept a good lawn?

Answer. Every other day I sprinkled the whole lawn over.

Question. That was the only inconvenience you experienced on account of what you call a lack of proper water supply?

Answer. During some time in 1891 it got too dry. I did all I could, but in patches it dried out, and I turned the sprinkler on those patches.

Question. For domestic purposes you had a pretty good water supply?

Answer. I had all the water I wanted to use in the house, because it was very little water I wanted to use there.

Question. How large a lot have you?

Answer. 100 x 100, including the house and all. The house is 32 x 54. Then there are three or four walks around—board walks about six feet wide and 100 feet long—and then there is a wood shed besides.

(Witness excused.)

EDGAR BROUGHTON, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla city, Mr. Broughton?

Answer. I do.

Question. How long have you resided here?

385 Answer. Very near three years.

Question. Are you a tax-payer of the city?

Answer. I am.

Question. What portion of the city do you reside in?

Answer. In Bryant's addition, in the southeast corner of the city.

Question. On what street?

Answer. On Pleasant street.

Question. On a main of the water company?

Answer. No, sir.

Question. Do you obtain your supply of water from the Walla Walla Water Company?

Answer. I do not.

Question. Have you ever made any effort to obtain your water supply from the water company?

Answer. I have.

Question. State what that effort was.

Answer. About three years ago, in November, I bought this piece of property, and there wasn't any water on that street; but the neighbors around there told me the company was going to put in a pipe on that street. I bought the property, and on the following spring, about March, I went to see Mr. Bowman to see if they were going to do it. He said he didn't think they were. I went to see some of the neighbors on the street, if they wanted water, and I found out several of them wanted water there, so I went back to see Mr. Bowman.

Question. Who is this Mr. Bowman?

Answer. He was then superintendent of the Walla Walla Water Company. And he told me that if I wanted to buy the pipe and do the work —

(COUNSEL FOR COMPLAINANT: I will object to this testimony with reference to what Mr. Bowman said in this respect, on the ground that it is hearsay, and also it is not responsive to the question.)

Answer. Mr. Bowman said if I would buy the pipe and
386 perform the labor of laying it, and then turn it over to the water company, that he would pay me back what I was out, in water at the usual rates. Well, at that time I found out what the price of pipe would be, and, as near as I could tell, it would cost me something over two hundred dollars for the pipe and the labor of laying it.

Question. Did you make any estimate of what that would be?

Answer. I did, but found out afterwards that my estimate was very low. The cost of laying that pipe would have been somewhere near to one hundred dollars.

Question. And you say you didn't have it laid?

Answer. I didn't because I made the proposition to the neighbors that if they would stand all but one hundred dollars I would stand one hundred dollars and have it laid. They didn't do it and I didn't have the pipe laid. I then put up a windmill and tank and have water of my own.

Question. Do you get your supply from that tank?

Answer. I do.

Question. State how many residences there are on that street or under the proposed line where this main would have been laid who are not supplied by the company.

Answer. Well, there are ten residences there on this line where we proposed to lay the pipe.

Question. Ten houses?

Answer. Ten houses, and there is one other party who proposed to take water, as it runs through his place. He said he would stand his part of the expense in order to get water on this street.

Question. The only way that — could get water, then, was by laying a main down that street?

Answer. That is the only way I know of.

Cross-examination :

Question. Were there ten houses in that neighborhood at that time?

Answer. Not at that time.

Question. How many were there?

387 Answer. There has been four built since.

Question. Then there was six built there before that time—what year did you say?

Answer. It was two years ago last March, or about March.

Question. About two years and a half ago, and within that time there have been four houses built in that neighborhood?

Answer. Yes.

Question. How large an area is that part of the city?

Answer. Well, there has been two built on Pleasant street and two on Division street. This line would have run from Whitman street down Division to Pleasant street, and down Pleasant to Chandler street.

Question. Do you know of any application being made since that time for water?

Answer. I don't. I have never made any application for water since that. I have no use for it.

Question. You don't know whether the rest of that neighborhood have asked for water?

Answer. I don't know whether they have or not.

Question. Did Mr. Bowman make that proposition to you, or did you make it to him?

Answer. Mr. Bowman made the proposition to me, if I would buy the pipe and perform the labor of laying it and turn it over to the company I could get my pay back in water at the usual rates.

Question. You went to see him first, did you?

Answer. I went to see him first about the water.

Question. How many went with you?

Answer. I went alone.

Question. Did you represent these other parties?

Answer. I told him how many wanted water.

Question. How many did you tell him there were?

Answer. I don't remember now how many there was.

Question. Five or six people?

Answer. That many I know.

388 Question. How far was this pipe required to be laid from the main that was then existing?

Answer. I don't know; somewhere close to two thousand feet.

Question. The farthest house was two thousand feet away from the company's main?

Answer. I don't know as it was quite two thousand feet.

Question. Very nearly two thousand feet?

Answer. Very near, I should say.

Question. In what addition?

Answer. Bryant's addition.

Question. In what part of the city is that?

Answer. It is in the southeast part of the city.

Redirect examination:

Question. What was the size of the pipe that Mr. Bowman suggested that you should lay?

(This question was objected to by counsel for defendant, on the ground that it is irrelevant, incompetent, and immaterial.)

Answer. I think, if I remember right, it was a four-inch pipe.

(Witness excused.)

(Signed)

E. BROUGHTON.

JAMES Z. SMITH, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Mr. Smith, you are a resident of Walla Walla city, are you?

Answer. Yes.

Question. How long have you resided here?

Answer. Since 1888.

Question. Are you a tax-payer of the city?

Answer. Yes, sir.

Question. You pay taxes on real estate, do you?

Answer. Yes, sir.

Question. Do you own residence property in the city?

Answer. Yes, sir.

389 Question. Where is it?

Answer. One piece is on Alder street. It is No. 702, on the corner of Alder and Howard street; and I own one house on McAuliff avenue, and one on Ninth street.

Question. Where is the house you are living in?

Answer. I am not living in any of them at present. I have rented out all three. I am boarding at present.

Question. You consider the houses good, do you?

Answer. Yes, sir; I was living in one of them last spring.

Question. In which one was that?

Answer. The one on Alder street.

Question. Alder and what?

Answer. Alder and Howard.

Question. How large a house is it?

Answer. A story and a half.

Question. How large square?

Answer. 38 by 28 feet.

Question. What is the height of it?

Answer. A story and a half.

Question. Have you been able to get sufficient water for domestic purposes?

Answer. I only had water in the yard. Mr. Turner and Mr. Superintendent Bowman, both told me—

Question. Who is Mr. Turner to whom you refer?

Answer. Harry Turner.

Question. Mr. Turner who is connected with the water company?

Answer. That is the man.

Question. Those officials told you what?

Answer. They told me they didn't think I could get enough force to pay me for sprinkling the lawn, and also that they wouldn't furnish me water for the lawn without I took it for house use; so I visited the different yards there in our part of the town to see what force they did have.

Question. What was the result?

390 Answer. Some places the sprinkler would take a round or two and then stop, and then start and take another round or two, and then stop again.

Question. When was that?

Answer. That was about the time I was growing my lawn, last spring a year ago.

Question. During the spring and summer?

Answer. Yes, sir.

Question. Did you hear any complaint about insufficient supply of water there?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

Question. From this personal investigation made, did you find the water supply sufficient or insufficient for proper irrigation?

Answer. I found it a good deal as Mr. Turner told me, that in the short time we had to run a sprinkler we didn't get sufficient water for the lawn.

Question. What do you mean by the short time that you had to run the sprinkler—during the prescribed hours?

Answer. Yes; with the force we could get.

Question. And that was the reason you didn't put it in?

Answer. At that time, yes.

Question. Is that a thickly settled portion of the city?

Answer. Yes; there are a good many residences there.

Question. Are they good residences?

Answer. Yes.

Cross-examination:

Question. That is a pretty nice part of the city, is it?

Answer. I think so.

Question. It is a nice residence portion of the city?

Answer. Yes.

Question. The places look well?

Answer. Well, some do and some do not.

Question. There are pretty nice lawns out there, are there not?

391 Question. Further down this way.

Question. All through that district?

Answer. No.

Question. Are there any other districts that have nicer lawns than in that part of the city?

Answer. Yes; further down this way there are nicer lawns; they are more green.

Question. Did you ever take any interest in this lawsuit of the water company against the city?

Answer. At the time the city was voting I did, from the simple fact—

Question. Never mind that. Did you ever circulate dodgers favoring the city?

Answer. I did not.

Question. What interest did you take?

Answer. During the time of voting I stood at the polls and worked with a hack and one thing and another, and got as many votes as I could, so that we could get a better and cheaper water system.

Question. Then you believed that would be accomplished by the city owning its own water works?

Answer. I did.

Question. Is your lot as poorly located as any in the district you have spoken of?

Answer. According to the way I have got it graded up, I think it is. It is graded up about four feet above the sidewalk.

Question. I understood you to say that you did put in a water supply?

Answer. I have lately, in the yard.

Question. How is the water supply?

Answer. It is doing pretty good at present.

Question. When was it put in?

Answer. About two weeks ago.

Question. Has it always given satisfaction since that?

Answer. Yes.

392 Question. You have plenty of water for irrigation purposes?

Answer. I haven't irrigated any.

Question. Haven't you sprinkled any during those two weeks?

Answer. Not at all.

Question. What do you mean by saying that it gave satisfaction?

Answer. For the house use.

Question. You had it for the house use some time ago?

Answer. No, sir; I had a well.

Question. You have only used it during those two weeks?

Answer. That is all.

Question. Did you personally make a demand for a water supply for that house?

Answer. I talked with Mr. Bowman several times, always to get discouraged. I couldn't get it for the lawn without taking it for the house. I had a well and cared more for the water for the yard than for the house.

Question. Have you pipes laid for your yard?

Answer. No, sir; only for the house.

(Witness excused.)

(Signed)

J. Z. SMITH.

JOHN LUMPP, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Do you reside in Walla Walla, Mr. Lumpp?

Answer. Yes, sir.

Question. How long have you resided here?

Answer. Thirty years.

Question. Are you a tax-payer of the city?

Answer. Yes, sir.

Question. In what portion of the city do you reside?

Answer. On Park and Craig street.

Question. Is that portion of the city pretty well settled?

Answer. Yes, sir.

Question. Are there a number of houses around you on all sides?

393 Answer. Not in front of me—that is, south or southeast.

Question. But on all other sides?

Answer. Yes, sir.

Question. Is there a large vacant lot in front of you?

Answer. Yes, sir.

Question. Do you take water from the Walla Walla Water Company?

Answer. I do.

Question. What is the nature of the supply of water they furnish you?

(This question was objected to by counsel for complainant, on the ground that it is irrelevant, incompetent, and immaterial.)

Answer. Last year I got the water put in. If I use water in the kitchen I haven't got water in the yard, and when I use water in the yard I haven't got any in the kitchen. There is only one pipe from the main pipe.

Question. How is the force in your yard for irrigation?

Answer. This year it is pretty good. Last year it didn't turn the sprinkler.

Question. Wouldn't it turn at all?

Answer. No; I have got the same sprinkler this year as I had last year.

Question. Is the force very large?

Answer. It suits me.

Question. Did your lawn suffer any last year on account of insufficient water supply?

Answer. I just started it. I didn't care much about it.

Question. You know there was not sufficient force to irrigate it?

Answer. No; there was not sufficient force last year. This year it runs a little more.

(Witness excused.)

(Signed)

JOHN LUMPP.

FRED. TALLABERA, being first duly sworn as a witness on the part of defendant-, testified as follows ;

394 Question. You reside in Walla Walla city ?

Answer. Yes, sir.

Question. How long have you resided in Walla Walla ?

Answer. Ten years the 20th day of next month.

Question. In what portion of the city do you reside ?

Answer. On Rose street between Fifth and Sixth.

Question. Do you get your water supply from the Walla Walla Water Company ?

Answer. Yes, sir.

Question. How is that supply—of much force ?

Answer. No force. I only irrigate a garden in front of my house, and when I turn it on the garden, there is very little water in the kitchen.

Question. Can't you use both at the same time ?

Answer. No, sir ; the flow is too weak. I can't put the hose on the hydrant and get water on top of my roof.

Question. How high is the roof ?

Answer. It is a one-story house.

Question. About how high ?

Answer. About thirteen feet.

Question. And the water won't raise to the top of the roof ?

Answer. I have got just a little lawn in front of the house. I have got a big lot, but I never use water for it. There is no lawn there ; it is just full of trees. I paid for it and wanted it, but they shut it off.

Question. That is all you use water for—irrigation ?

Answer. Yes ; that is all.

Question. And that requires no particular force ?

Answer. No.

395 Question. Is there not force enough at your place to properly cultivate a lawn ?

Answer. No, sir.

Question. You live in a thickly settled portion of the city. Are there many houses around you ?

Answer. There are three houses across the street, and a barn and blacksmith shop at the corner, and a barn again, and a gas factory the next house below on the next block, and several more large residence- also on the next block.

Cross-examination :

Question. Outside of those houses, there are none others in that neighborhood and none at all near you ?

Answer. There are none near me, only across the street.

Question. What connection have you with the main of the water company—a good connection ?

Answer. What ?

Question. How is your pipe connected ?

Answer. My pipe is connected from Rose street.

Question. How long is the pipe which connects your house with the company's main?

Answer. From the main to the kitchen—it is fifty feet from the gate to the kitchen.

Question. You have plenty of water, don't you, for the house?

Answer. I don't sprinkle only the front.

Question. When you are not sprinkling, you have plenty for the house?

Answer. When I use it for the house I want all I pay for.

Question. What I want to know is whether you have enough for the house?

Answer. I have got enough. I have got a very small family; just three in the family.

Question. You have enough water, have you?

Answer. Not so much. Suppose there was a fire around the house, the hose would be no good.

396 Question. If your house would get on fire the fire-engine would come and put the fire out, wouldn't it?

Answer. No, sir.

Question. But for ordinary purposes you have enough water?

Answer. I have not got plenty; no.

Question. Your only trouble is during the sprinkling season, isn't it?

Answer. I have enough to get along with, but I never can get water enough for irrigation.

Question. You have a lawn there now?

Answer. No, sir; just a little bit in front—thirty feet one way and fifteen the other.

Question. Did you ever try to put in any lawn?

Answer. Did I try? No; there was no use of it.

Question. When you don't use water in the house you have plenty of water for the lawn, haven't you?

Answer. Yes; enough to sprinkle that little lawn I have in front of the house.

Question. The water comes out with pretty good force for sprinkling?

Answer. No.

Question. What size is your hose?

Answer. I have no hose. It is a round sprinkler.

Question. A sprinkler that turns around?

Answer. Yes; it turns around.

Question. How often do you move it during the five hours?

Answer. Every two hours and a half. I have just got to move it twice; that is all I can move it.

(Witness excused.)

(Signed)

J. F. TALABERE.

GEORGE R. CROW, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla city, do you, Mr. Crow?

Answer. Yes, sir.

397 Question. How long have you resided here?

Answer. Since 1862.

Question. You are a tax-payer of Walla Walla city?

Answer. Yes, sir.

Question. Where do you own property in Walla Walla city?

Answer. I own it over on Fifth street.

Question. How many houses?

Answer. I have got three houses—two on Fifth street and one on Main street.

Question. Referring now to the houses on Fifth street, have you a supply of water from the Walla Walla Water Company for those houses now?

Answer. Yes, sir.

Question. Is there a main laid in front of those houses?

Answer. Yes, sir.

Question. How came that main to be laid?

Answer. I put it there; at least, I went to the water company and told them I wanted it if I paid them for putting it there. They told me they would lay it for twenty dollars.

Question. Did you pay them this twenty dollars?

Answer. Yes.

Question. And they laid the main for you?

Answer. Yes, sir.

Question. And the main still remains there?

Answer. Yes, sir.

Question. Now, how did you proceed to get the connection from that main to your house?

Answer. I told them I wanted them to connect it and I had to pay them sixteen dollars.

Question. To connect the pipe?

Answer. Yes, sir.

Question. For the two houses?

Answer. Yes; for the two houses.

Question. Does anybody else live on that same street?

398 Answer. Yes, sir.

Question. Is anybody else connected on that same main?

Answer. Yes, sir.

Question. Did they pay?

Answer. Yes, sir.

Question. How much?

Answer. Eight dollars.

Question. Then there are three connections on this same main?

Answer. Three connections, yes.

Cross-examination :

Question. Haven't you had an ample supply of water?

Answer. If I get up at four o'clock in the morning when the others don't irrigate, yes.

Question. If you get up at four o'clock in the morning—do the others irrigate as early as that?

Answer. I don't know when they irrigate. When they do irrigate, there is not quite as much as when I get up very early in the morning and get the full force of the water.

Question. Do you mean that you can't irrigate during any other part of the day?

Answer. Yes; there is enough water all the time. I went to Mr. Turner and told him I was short of water, and Mr. Turner very politely told me to use it at any time I wanted it.

Question. You are satisfied with the water supply?

Answer. Yes; I haven't got anything else to do, and I might just as well put in half the day at that as at anything.

Question. Have you plenty of water for the house?

Answer. Yes, sir.

Question. You have no complaint as to the water supply for the house?

Answer. No complaint at all.

Question. Do you know whether the people in that neighborhood are restricted as to hours of sprinkling?

Answer. Not this year. I saw Mr. Turner and he told me
399 to use it at any time I wanted it. He said it didn't make any difference.

Question. Is that a thickly settled neighborhood?

Answer. Yes, sir; it is thickly settled.

Question. Are the people there supplied with water, as far as you know?

Answer. All I know of.

Question. Are they amply supplied?

Answer. I don't know anything about that.

Question. What is the general appearance of that part of town, so far as the lawns are concerned?

Answer. Some of them have nice lawns. Some are pretty well fixed and have pretty nice houses.

Question. Is their water supply obtained from the water company?

Answer. Yes.

Question. Have they plenty of flowers, trees, etc., in their yards?

Answer. Yes, sir.

Question. Do you know whether everybody in that neighborhood is compelled to get up at four o'clock in the morning to irrigate their lawns?

Answer. No; I think not. I do it because I get the full force.

Question. You could do without it?

Answer. Yes; by working a little longer.

Question. You simply do that for your own convenience?

Answer. I do it to get the full force of the water. The fact is, if you get up early, when no others are irrigating, it don't take half as long as it otherwise would to get it done.

Question. That would be the case now?

Answer. Yes.

Redirect examination :

Question. With the present main force it takes considerable
400 labor to irrigate your lawn, doesn't it?

Answer. Yes; considerable.

Question. Wouldn't it take considerable less labor with more force?

Answer. Yes; the greater the force, the less time it takes. I think my pipe is a little small.

Question. How large is it?

Answer. An inch and a half.

Question. You say Mr. Turner told you you could use it all the time?

Answer. Yes.

Question. When was that?

Answer. This summer I told him the pipe was small. He said if I couldn't get enough to use it whenever I wanted it.

Question. During the past year, as far as you know, have not the water company been much more lenient in their regulations?

Answer. Yes.

Question. They haven't enforced them so strictly?

Answer. No, sir; I have had no trouble with the water company.

Question. You have not at all, at any time?

Answer. No, sir.

Question. During this last year wasn't it an unusually rainy fall?

Answer. I think so.

Question. You have lived here since 1862?

Answer. Yes, sir.

Question. Hasn't there been about as large a rainfall and snow this past year as there has ever been before since you have been here?

Answer. I think there was more this last year.

Question. Than you ever knew before?

Answer. Yes, sir.

Question. Do you know from your own observation what
401 effect it would be likely to have on springs?

Answer. There would be more water.

Question. You have observed the effect on springs in this country, have you?

Answer. Yes.

Question. Do you know it to be a fact that when a great deal of rain falls during the fall and winter that the springs will flow more water?

Answer. Yes; I think so.

Question. You have noticed it, have you ?

Answer. Yes; I think I have.

(Witness excused.)

(Signed)

GEORGE R. CROWE.

FITZHUGH NEWMAN, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Do you reside in Walla Walla ?

Answer. Yes, sir.

Question. What is your occupation ?

Answer. I am an observer of the Weather Bureau.

Question. Are you the official observer ?

Answer. Yes.

Question. Of the United States Weather Bureau ?

Answer. Yes, sir.

Question. Have you in your office a record, Mr. Newman, of the comparative rainfall in Walla Walla since the Signal Service office was established here ?

Answer. Yes, sir.

Question. Have you examined that record ?

Question. What do you mean—for what time ?

Answer. During the time since the Signal Service office was established.

Answer. Oh, yes, sir.

Question. Will you state what was the rainfall of last year as compared with the rainfall of the year before ?

402 Answer. It was a good deal more, sir.

Question. How much more ?

Answer. I think it is about five inches.

Question. About five inches more ?

Answer. In excess ; yes, sir.

Question. Is the excess over the average ?

Answer. Yes, sir ; over the normal.

Cross-examination :

Question. What is the normal rainfall ?

Answer. About 16 $\frac{3}{4}$ inches.

Question. Do you know what it was in 1891 ?

Answer. No, sir ; I do not.

Question. How did you get that average ?

Answer. I simply divided the rainfall by the number of years.

Question. When did you make that average ?

Answer. Last year, including last year in.

Question. When you made it recently ?

Answer. Recently ; it would run from that time.

Question. When did you estimate the average rainfall of Walla Walla ; what particular time of the year did you do it—yesterday or today ?

Answer. Some time last year.

Question. Have you any recollection at all as to the rainfall in Walla Walla during the last three or four years?

Answer. Last year it was twenty-two inches and about sixty hundredths.

Question. And the year before?

Answer. I don't remember.

Question. Haven't you any recollection?

Answer. No, sir; I haven't.

Question. In your business you are acquainted generally, are you not, with the rainfall of different localities of the Pacific coast or parts of the Pacific coast?

Answer. Yes; parts of it.

403 Question. What is the rainfall of Seattle and Tacoma—the average rainfall?

Answer. I wouldn't like to say.

Question. As compared with Walla Walla?

Answer. Double, I suppose.

Question. Isn't it at least double?

Answer. Yes, sir.

Question. And probably more than that?

Answer. Probably it is more.

Question. Walla Walla has a small rainfall for this coast, hasn't it?

Answer. Yes, sir.

Question. Exceptionally so?

Answer. Yes, sir.

Question. Do you know through what months this rain is—this excessive rainfall?

Answer. Yes, sir; it commenced, I remember, the 12th of September and was excessive the balance of the year.

Question. That is, from September until January?

Answer. Yes, sir.

Question. Was there any more rain during the summer months prior to September?

Answer. No, sir; I think not. It was about the same as usual.

Question. And this year was about the same rainfall, wasn't it?

Answer. Oh, no, sir; it has been excess about four inches and three-quarters, I think—in excess of the normal.

Redirect examination:

Question. Now, Mr. Newman, this rainfall, together with the fall of snow, is what you call precipitation, isn't it?

Answer. Yes, sir.

Question. In this estimate when you say that the rainfall has been five inches more than normal you included the fall of snow, did you?

404 Answer. Yes; everything.

Question. All precipitation?

Answer. Yes, sir.

Question. From the records of the office does it not appear, Mr. Newman, that the highest precipitation occurred this year?

Answer. The highest?

Question. Yes.

Answer. Yes, sir; I think it is, up to date.

Question. The highest you have ever recorded in the office?

Answer. Yes, sir.

Cross-examination:

Question. Do you separate the fall of snow from that of rain in precipitation?

Answer. No, sir; it is all added up together.

Question. From your observation and occupation do you know whether or not there is more snow in the western part of this State, over on the sound, than there is in Walla Walla?

Answer. No, sir; I think not. I am not much acquainted with the sound; I have never been there but once.

Question. Is there more there than here?

Answer. I think so; I wouldn't swear to it.

Question. You estimated the precipitation?

Answer. Yes, sir.

Question. In order to do that were you compelled to discover the amount of rainfall and then of snow?

Answer. Yes, sir.

Question. Do you know how much snow falls in Walla Walla, on an average?

— I can't tell without looking over the records.

Question. You don't know anything about the snow, except that you know that there is more snow there than here?

Answer. I think we have less snow.

(Witness excused.)

(Signed)

F. NEWMAN.

405 JOHN MANION, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Where do you reside?

Answer. I reside in the southeast corner of the city.

Question. Were you a member of the common council of the city of Walla Walla in 1887?

Answer. I was.

Question. Were you a member of the common council at the time the ordinance referred to in the bill of complaint in this action was passed?

Answer. Yes, sir.

Question. And the contract was made with the Walla Walla Water Company?

Answer. Yes, sir.

Question. I will ask you whether or not any petition was presented to the council upon the citizens' side?

Answer. Not that I know of.

Question. I will ask you whether or not any demand was made

by the public for the making of this contract and the passage of this ordinance?

Answer. Not that I know of.

Question. From whom did the request come?

Answer. The first I heard of it, Mr. Eastman, who was living in Oregon City, came up here and spoke in the council meeting.

Question. Did he remain until the contract was finally consummated?

Answer. I can't say. It was some time under consideration.

Question. Were any representations made to the city that would tend toward the adoption of the contract?

Answer. Yes; representations were made in regard to it to the city.

Question. What representations were made?

Answer. In the first place, that the city could get along
406 without horses commonly in case this system was adopted.

(COUNSEL FOR COMPLAINANT: I will object to this testimony as incompetent, irrelevant, and immaterial.)

Answer. And so would save considerable money by taking this contract.

Question. That is, that it wouldn't be necessary to use engines commonly?

Answer. Yes; because there would be such a pressure on the hydrants they wouldn't require them.

Question. Was that matter discussed more or less in the council?

Answer. In the council, and out of the council between the members.

Question. By what vote was the ordinance finally passed?

Answer. The vote was three to four.

Question. Who in the council took the most prominent part in favoring the passage of the ordinance and the making of the contract?

Answer. J. M. Hill, William Stine, Mr. Bowman, and Mr. Esteb voted for it, and Mr. Maunio, Mr. ———, and ——— voted against it.

Question. Were there any of the members of the council who had an interest in the water company?

Answer. I don't know.

Cross-examination :

Question. You are one of those in the minority, then?

Answer. Yes; I am.

Question. Did you ever examine the source of the supply of water?

Answer. Well, I had no water. I examined it afterwards.

Question. You didn't examine it at the time?

Answer. No; not until the ordinance was passed.

Question. After the contract was let?

Answer. After the contract was let.

407 Question. Have you ever made any estimate as to the cost of water works, in case the city should build any?

Answer. At the time they talked over what the property could be bought for, before the contract was given. I didn't make any estimate afterwards.

Question. Wasn't it generally admitted by the council that the city couldn't purchase the then plant of the water company, or put up their own water works, without exceeding the constitutional indebtedness of the city?

Answer. Not without exceeding the constitutional indebtedness of the city.

Question. The majority of the council took that view of it or they wouldn't have voted for the contract, would they?

Answer. The city was about as well able to put in a water system then as it is now.

(Witness excused.)

(Signed)

JOHN MANION.

CHARLES W. TAYLOR, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Mr. Taylor, do you reside in Walla Walla city?

Answer. Yes, sir.

Question. Are you a tax-payer in Walla Walla city?

Answer. Yes, sir.

Question. How long have you been such tax-payer?

Answer. Since 1885.

Question. In what part of the city do you reside?

Answer. On Rose street, between Touchet and Idaho.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. Yes, sir.

Question. How is your supply?

Answer. We have had enough for ordinary purposes for two years.

408 Question. Do you use water for irrigation and domestic purposes?

Answer. Yes, sir.

Question. How is the force in your yard?

Answer. It has very little force in the yard.

Question. Is there enough to sprinkle with?

Answer. Yes.

Question. With the force you have, does it take a good deal of time to sprinkle your yard?

Answer. Well, yes; it takes a good deal of time.

Question. And it is more trouble than it would be with sufficient force?

Answer. Certainly.

Question. How is it for domestic purposes?

Answer. There has been plenty for the last two years.

Question. Before that did you have trouble with the water supply?

Answer. Before that, yes.

Question. What year was that?

Answer. 1892 and 1893, mostly.

Question. You had trouble getting water in your house, did you?

Answer. Yes; there were times that we couldn't get any in the house.

Question. How long did you do without water in the house?

Answer. Off and on during the dry season of July and August, principally.

Question. What were you compelled to do through those months for water in the house?

Answer. We were compelled to go out to the hydrant, lower down in the yard.

Question. How far from the house?

Answer. Eight or ten feet from the porch.

Question. And to carry the water to the house?

Answer. Yes, sir.

Question. During that time were you paying for water in the house?

409 Answer. Yes, sir.

Cross-examination :

Question. You have never had serious cause for complaint?

Answer. I have never made complaint.

Question. You have never had any cause for complaint, have you?

Question. I have, in regard to irrigation.

Question. What complaint did you make?

Answer. I called the attention of the superintendent to the fact that I didn't get enough water for irrigation.

Question. Since that has the supply improved?

Answer. It has improved, I think, if I remember, since 1893, or the late part of the summer.

Question. 1893?

Answer. 1893; yes, sir.

Question. Have there been some extensions and improvements made since then?

Answer. They run a pipe across from Main street down Touchet street and connected with the pipe on Rose street, and since that time I have had plenty of water.

Question. You never made a protest against paying your water rent?

Answer. No, sir. I called the superintendent's attention to it, and they left it with me in regard to irrigation but not for the house. I always paid for water for the house, but I didn't have any during the principle part of two summers.

(Witness excused.)

(Signed)

C. W. TAYLOR.

Court was then adjourned until tomorrow morning at nine o'clock.

SEPTEMBER 28TH, 1894—nine o'clock a. m.

Court met pursuant to its adjournment of yesterday, all parties interested being present. The following proceedings were had :

410 W. A. KELLEY, being first duly sworn as a witness on the part of defendant-, testified as follows :

Question. Do you reside in Walla Walla, Mr. Kelley ?

Answer. Yes, sir.

Question. What is your occupation ?

Answer. Hotel-keeper.

Question. Are you a tax-payer of the city ?

Answer. Yes, sir.

Question. How long have you resided here ?

Answer. I came to Walla Walla in 1877.

Question. How long have you been in the hotel business here ?

Answer. Seven years.

Question. What building have you occupied during that time as a hotel ?

Answer. The Delmonico.

Question. Where was it situated ?

Answer. On the corner of Fourth and Main.

Question. What other building ?

Answer. The Louga building, annexed.

Question. Where was the Louga building ?

Answer. Between Fourth and Third.

Question. Both are on Main street, are they not ?

Answer. Yes, sir.

Question. When was it you kept the Delmonica building ?

Answer. I left it a year ago last January.

Question. When did you give it up ?

Answer. A year ago last January.

Question. State whether or not, Mr. Kelley, you were able to get water supplied to the second floor of the Delmonico.

Answer. Not in the summer time.

Question. During what year did this occur ?

Answer. The first four years.

Question. The first four years that you had it ?

Answer. Yes, sir.

411 Question. How about the Louga building—was it the same ?

Answer. Yes, sir.

Question. Were you unable to get a supply of water on the second floor ?

Answer. Not during the summer time.

Cross-examination :

Question. What was your business before you went into the hotel business ?

Answer. Well, a little of everything.

Question. When did you first go into the hotel business?

Answer. When did I first go into the hotel business?

Question. Here in Walla Walla, I mean.

Answer. Six or seven years ago—seven years ago.

Question. Seven years ago from what month?

Answer. From last January.

Question. You say this water supply was insufficient during the first four years that you were in the business?

Answer. During all the time up to the last year that I was there.

Question. I thought you said during the first four years that you were in the business your water supply was insufficient?

Answer. The first four years that I was in the Delmonico.

Question. Did you get no supply at all during the summer months?

Answer. No, sir; not upstairs.

Question. Not on the second floor?

Answer. No, sir.

Question. How many sets of service pipes did you have connecting with the company's main to supply you?

Answer. For upstairs?

Question. Yes; and downstairs, both.

Answer. It was in two separate divisions.

Question. Not connected at all?

Answer. No, sir; each room had its own water pipe.

412 Question. Each room had its own water pipe?

Answer. That is, that used to be two stories before it was a hotel, and each room had its own pipe, and the room on the lower side I had divided for a dining-room and kitchen, and the upstairs was used for rooms, and the upper room downstairs was divided into an office and a saloon and wash-room.

Question. This second floor was supplied only through the summer months?

Answer. That is all.

Question. You had an ample supply during the other months?

Answer. Yes; I had plenty of water; only during three months it wasn't very strong, is all I could see.

(Witness excused.)

(Signed)

W. A. KELLY.

SAMUEL COTTRELL, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Mr. Cottrell, do you reside in Walla Walla?

Answer. Yes, sir.

Question. How long have you resided here?

Answer. Twenty-two or twenty-three years.

Question. What business have you been engaged in during this time?

Answer. Principally night watchman of a hotel, and saloon-keeping.

Question. Have you been janitor of the Stencil building?

Answer. Yes, sir.

Question. How long were you janitor of the Stencil building?

Answer. From September, 1891, up to May, 1894.

Question. Mr. Cottrell, while you were janitor there, how was the water supply of the building?

Answer. For everything on the third story, there was no water at all there. They had a pump down in the basement on purpose to throw water onto the third story.

413 Question. You were getting your water supply from the Walla Walla Water Company, were you?

Answer. Yes, sir.

Question. Were there any water-closets or urinals on the third story?

Answer. Yes, sir.

Question. State if at any time the use of those water-closets was destroyed on account of lack of water.

Answer. Yes; lots of times I had to pack water up—lots of times.

Question. You had to carry water up to the third floor?

Answer. In fact, there was none at all until they strengthened it. There was at first no water on the third floor for twelve months or so. They had to put in a pump, as the water wasn't strong enough to go to the third floor.

Question. Do you remember at any time of any trouble on account of the urinals stopping up?

Answer. I know I had to pack water to wash them out.

Question. Did that happen very often?

Answer. Yes, sir.

Cross-examination:

Question. When were you janitor?

Answer. From 1891 to about May last, 1894.

Question. You have no trouble now, have you?

Answer. Yes; sometimes there has been water on the top story and at other times there has not. I have carried water up on the third story within the last month, to wash closets out.

Question. You are simply janitor there?

Answer. Yes, sir.

Question. You don't know whether the service pipes connecting with the mains of the water company are in good condition or not?

Answer. Well, when the pipe got stopped up we had to get the plumber to open it.

Question. And then the water would flow?

414 Answer. Yes; then the water would flow as soon as there was pressure enough to send it up. Sometimes it wouldn't.

Question. Did you ever send for the plumber and have the pipes cleaned, and then have a failure of the water supply?

Answer. I don't know as I did. It is only very lately that I didn't attend to it myself. I have always kept the pipe clean until some time last May.

Question. And since then the plumber kept them clean?

Answer. He did since May. I always kept them clean until last May.

Question. You have had an ample supply of water since then, have you not?

Answer. Yes.

Redirect examination :

Question. You said you had had an ample water supply since May ; have you had for all purposes ?

Answer. Sometimes we have been without it on the top story.

Question. On the third floor you have frequently been without water since last May ?

Answer. Yes ; we have frequently been without water. I never paid much attention to why it has been, but I think possibly they might have been doing some repairs around town. There was never any trouble about it.

Question. This occurred quite frequently, did it?

Answer. Yes ; the first of this month I guess it occurred twice.

Question. Has that not been a frequent occurrence during the last three or four years ?

Answer. Yes.

Question. Where is the Stencil building situated ?

Answer. It is on the corner of Third and Main street.

Question. It is a three-story building ?

Answer. Yes, sir.

(Witness excused.)

415 JOSEPH GRAAFF, being first duly sworn as a witness on the part of defendant-, testified as follows :

Question. Mr. Graaff, do you reside in Walla Walla ?

Answer. I do.

Question. How long have you resided here ?

Answer. A year.

Question. Are you a member of the fire department ?

Answer. I am.

Question. Do you remember a fire that occurred in Walla Walla, known as the City Hotel fire ?

Answer. I do.

Question. When was that fire ?

Answer. I don't know exactly—about four weeks ago. It was Sunday morning, between four and five o'clock.

Question. Where was it ?

Answer. In the City hotel.

Question. Where was the City hotel situated ?

Answer. Between Fourth and Fifth street-, and Maine and Rose.

Question. Was it quite a large fire ?

Answer. Yes, sir.

Question. Was it not a particularly exciting fire ?

Answer. Yes. I had assisted in bringing up the hose with Jake Kauffman from Fifth up the alley to Fourth street.

Question. Do you know Y. C. Blalock ?

Answer. I do.

Question. Did you receive any orders from Y. C. Blalock in connection to that fire ?

Answer. In the morning, I did.

Question. What was that order ?

Answer. There was a little frame building this side of the hotel. There was a space of about fifteen or eighteen feet back of that, and we were trying to play the hose there and it wouldn't reach—the water wouldn't reach.

Question. The water wouldn't reach eighteen feet from the nozzle ?

416 Answer. No, sir.

Question. Did you receive any orders from Mr. Blalock ?

Answer. Not at that time. I and Tom Bryant went inside. We saw we couldn't get it there at all, so we came out and still had hold of the hose. A Frenchman had a little shop beside of the hotel and the roof caught fire and he asked us——

Question. Never mind what the Frenchman said.

Answer. We tried to play the water on top of the roof, and the water wouldn't reach at all.

Question. How high was the roof ?

Answer. It was not over eighteen or nineteen feet ; it was a small one-story building.

Question. The water wouldn't reach that distance ?

Answer. No ; Tom Bryant told me to get on top of the roof, which I did, but there was such a small stream of water Tom said, "Come down, it will do no good ; the water don't seem to come out at all." Towards the last it was nearly exhausted.

Question. What, if any, orders did you receive from Chief Blalock ?

Answer. Blalock said, "Drop the hose ; there ain't no water," and we dropped the hose down. It was somebody. I don't know that it was Chief Blalock, but it was somebody from where he stood.

Question. State exactly what Chief Blalock said.

Answer. Well, the order came from the direction where Blalock was standing, to roll the hose up. Tom Bryant said, "To hell with the hose."

(COUNSEL FOR COMPLAINANT : I object to that testimony.)

Question. Don't you know what Blalock said ?

Answer. I couldn't swear that it was Blalock, but it came from where Blalock was standing.

Question. What was it you say you heard—some one said roll up the hose ?

Answer. He said, "Roll up the hose ; there is no water." There was no water coming from the hose.

417 (This question was objected to by counsel for complainant, on the ground that it was leading.)

Question. Was Blalock in the crowd?

Answer. He was.

Question. In the direction of that voice?

Answer. Yes; he was about ten feet away.

Question. And he didn't answer?

Answer. He didn't answer.

Question. And in accordance with his directions you moved the hose away?

Answer. No; we dropped the hose.

(This question was objected to by counsel for complainant, on the ground that it is leading.)

Question. You ceased trying entirely, did you?

Answer. There was no water and we had to stop. There was no water at all coming from the nozzle of the hose.

Cross-examination :

Question. Were you present shortly after the fire started?

Answer. I was present while the fire was burning—about fifteen or twenty minutes.

Question. When you got there was the building all in a blaze?

Answer. It was not all in a blaze; it had commenced to burn.

Question. The fire had a pretty good headway when you got there?

Answer. A pretty good headway; yes.

Question. How long after the fire started was it that you heard this conversation?

Answer. Immediately afterwards.

Question. When Chief Blalock told you to drop the hose?

Answer. Oh, no; we had worked at the fire then, I guess, very near an hour.

Question. It was out, practically, on the hotel proper?

Answer. No; it was not.

Question. Was it still burning?

418 Answer. Yes; it was still burning.

Question. Did you have this same difficulty with the hose from the start?

Answer. Not the same difficulty, but it was a very poor stream.

Question. But it was much poorer afterwards?

Answer. Yes; I considered it so.

(Witness excused.)

(Signed)

J. S. GRAAFF.

MILTON EVANS, being first duly sworn as a witness on the part of defendant, testified as follows :

Question. Do you reside in Walla Walla?

Answer. Yes, sir.

Question. Are you a tax-payer here?

Answer. I am.

Question. How long have you resided here?

Answer. Thirty odd years.

Question. What portion of the city do you reside in?

Answer. In the central portion.

Question. Well, describe the location—what street is it on?

Answer. On the corner of First and Birch street.

Question. Do you obtain your supply of water from the Walla Walla Water Company?

Answer. I do.

Question. For domestic and irrigation purposes?

Answer. Yes, sir.

Question. State if at all times you have had sufficient water for those purposes.

Answer. Well, it has been a little short for sprinkling sometimes.

Question. To what extent has it been shut off, or has the force been insufficient?

419 Answer. Oh, it has been fair for sprinkling. Of course, it has had very little force sometimes. I have no particular complaint as to that, though.

Question. How about the amount of force required to sprinkle your lawn?

Answer. It is very liberal.

Question. Do you consider it inadequate to properly sprinkle your lawn?

Answer. At times.

Question. At what times?

Answer. During the irrigation season.

Question. During the summer months especially?

Answer. Yes, sir.

(Witness excused.)

(Signed)

MILTON EVANS.

JOHN L. ROBERTS, being recalled as a witness on the part of defendant, testified as follows:

Question. Mr. Roberts, you testified the other day concerning the cost of the plant of the Walla Walla Water Company at the time the contract was made, in 1887, as being fifteen or sixteen thousand dollars, or somewhere along there?

Answer. Yes.

Question. Have you made any estimate of the value of what has been added to the plant since then?

Answer. I have.

Question. State what the additions are worth.

Answer. Since that time, in round numbers there has been about twenty-five thousand dollars' worth added—that is, it could be replaced at the present time and at the present prices with the same kind of pipe in the ground for twenty-five thousand dollars; that is in addition to what I testified to before.

Question. That is in addition now?

Answer. Yes; the pipe and laying it. We made a further esti-

mate of other things, such as the supply-ditch, etc., which
420 rose the estimate up to fifty-one thousand dollars, including
stand-pipes, etc.

Question. Have you made any calculation, Mr. Roberts, as to whether or not two competing systems could exist in Walla Walla?

Answer. I have.

Question. State what conclusion you reached.

Answer. The conclusion I have reached is that the city could afford to put this plant in for fire protection and sewerage and sprinkling purposes, without selling any water to consumers at all. We would receive also a benefit by reduced rates of insurance and cost of maintaining the fire department, for it has been recommended by the chief engineer that new fire-engines were required, and I think he has recommended a chemical engine. He has recommended also another fire station to be placed up in the other end of town. I think the probability was, if this was carried out, the city would have to expend in the neighborhood of fifty or sixty thousand dollars, and by putting this plant in and getting the pressure on the mains that would do away with purchasing this fire-engine, and the paying the engineers, etc. We also had letters from Mr.—

(COUNSEL FOR COMPLAINANT: I object to any testimony in regard to the contents of those letters, as not the best evidence, and also on the ground that it is voluntary testimony and not responsive to the question.)

Question. Go ahead.

Answer. We had letters from Mr. Parkhurst promising a reduction of ten or fifteen per cent. on insurance rates, provided mains were put in properly.

(COUNSEL FOR COMPLAINANT: I object to this testimony that has just been given and move that it be stricken out.)

Answer. I reached the conclusion that we could put in a water system, and the reduction in insurance rate and the reduction of
421 maintaining the fire department alone would pay the interest
on the bonds of one hundred and sixty thousand dollars.

Question. Mr. Roberts, are you familiar with iron pipe and the amount of flow obtained through certain sized pipe?

Answer. Well, I have had some experience in that line.

Question. I will ask you if you know what head is obtained from the reservoir of the Walla Walla Water Company to the different parts of the city.

Answer. I wouldn't be positive in regard to the heads without computing the pressure given in different hydrants.

Question. Have you made any calculation of the flow from those hydrants that have been mentioned in the testimony, under the amount of pressure stated?

Answer. I have some that I am particularly interested in.

Question. What ones?

Answer. In front of my shop.

Question. State what you found from that.

Answer. I computed from the pressure on that hydrant, which has a four-inch main leading to it, and calculated that the actual discharge of that hydrant would not be over two hundred and twenty gallons a minute—that is, taking into consideration the resistance of the elbows, etc.

Question. What is the discharge from an ordinary steam fire-engine, running at its full capacity, throwing two streams through inch nozzles?

Answer. A fire-engine is calculated to throw seven hundred gallons a minute, running at full capacity.

Question. So the pressure there wouldn't supply one stream?

Answer. Hardly one stream.

Question. Well, now, what is the character of the property in the vicinity of your shop?

Answer. Well, there is a foundry and agricultural works, and there is a hotel building, and there is most of the year a good deal of transient property, consisting of engines, threshers, etc.

Question. Is there a manufactory of farming implements next to your foundry?

422 Answer. Yes; and a brick building belonging to myself and residences back on the alley.

Question. Does all that property depend for fire protection upon that hydrant?

Answer. At the present time. We did depend upon a row of cisterns placed upon that street, which took their supply from the flume of Glassford's mill tailrace, and that flume fell down about a year ago, and the supply now is very uncertain.

Question. Did you compute the number of gallons flowing from any other hydrants in the city?

Answer. I did; from the hydrant at the corner of Tenth and Alder street.

Question. What was the result of that computation?

Answer. One hundred and ninety-two gallons, I believe.

Question. Any other?

Answer. Yes; at Main and Fifth.

Question. What was the result of that computation?

Answer. From five hundred to five hundred and fifty gallons.

Question. Any other?

Answer. Main and Fourth.

Question. With what result?

Answer. The same result, or a very little different. I believe that is all.

Cross-examination:

Question. You know Mr. Sutherland, do you not?

Answer. I do.

Question. He is a plumber here in Walla Walla, I believe?

Answer. Yes.

Question. Did you make this computation with him, as to the cost of the expenditures of the Walla Walla Water Company since 1887?

Answer. I did; yes.

Question. What did you include in those expenditures?

423 Answer. We included the plant of course; that is in the fifty-one thousand and some odd dollars. We did not include the reservoirs and the land and the water rights.

Question. Did you include the ditch?

Answer. We did.

Question. Do you know how much it would cost to put in that ditch?

Answer. Two ditches were shown to me on that map—one twelve hundred feet, I believe, and one thirteen hundred feet long.

Question. How much did you compute the cost of those ditches at?

Answer. One was computed at one dollar and the other at one dollar and twenty-five cents a foot.

Question. And the stand pipes—what did you estimate them to be worth?

Answer. The stand pipes, foundations, and erecting them, seven hundred dollars.

Question. And the pipes at twenty-five thousand dollars?

Answer. No, the amount that was in the ground prior to 1887 was fifteen thousand and some odd dollars, and the amount placed since that time could be replaced at the present time for twenty-five thousand dollars.

Question. That is all you included, then, in your estimate of the expenditures since 1887—the pipes, mains laid, two ditches dug, and the stand pipes?

Answer. That is all.

Question. Then you concluded that the stand pipes and the ditches cost the difference between twenty-five thousand dollars and fifty-one thousand dollars?

Answer. No, there were some other things.

Question. I thought you said there were not any other things?

Answer. I omitted some.

Question. What did you omit?

Answer. Connections, valves, stops, etc.

424 Question. Do they make up the difference?

Answer. The ditches, stand pipes, and those things, make the difference.

Question. If you included the pipes and mains, twenty-five thousand dollars; the stand pipes, seven hundred dollars, and digging two ditches, about twenty-four hundred dollars, then the connections would amount to over twenty thousand dollars, would they?

Answer. How is that?

Question. Did the connections cost over twenty thousand dollars?

Answer. I said twenty-five thousand dollars.

Question. What did you include in this estimate of fifty-one thousand dollars?

Answer. I couldn't tell you.

Question. You did tell me.

Answer. There is fifteen thousand dollars for the amount of pipe

laid in the ground prior to 1887 and twenty-five thousand dollars additional on top of that, which would make forty thousand dollars, and then twenty-five hundred dollars for the stops, connections, etc., and then the ditching on that, and the stand pipes.

Question. The stand pipes you estimated at seven hundred dollars?

Answer. The stand pipes, foundation, and erecting them, seven hundred dollars, making it up to fifty-one thousand dollars.

Question. That doesn't make fifty-one thousand.

Answer. That is from memory. There may be some other things.

Question. Mr. Sutherland had the same opportunity of knowing about that estimate as you had?

Answer. Yes; about the principal part. All these things were taken from a memorandum.

Question. Did you hear Mr. Sutherland's testimony?

Answer. No.

Question. Mr. Sutherland testified that you and he both agreed on the estimate of fifty-one thousand dollars for the pipes and mains and land. You are positive that your estimate includes other things?

Answer. I am positive about what I am testifying.

Question. Your estimate, then, includes other things?

425 Answer. It was just what I enumerated to him. There were some other things that slipped my memory. I don't care what he testified; I am testifying for myself.

Question. If Mr. Sutherland as a matter of fact testified that you and he agreed as to the amount of expenditures being fifty-one thousand dollars, are you prepared to say that you didn't agree with him on your estimate?

Answer. I don't know anything about his testimony.

Question. If he did, are you prepared to say that he didn't give his testimony correctly?

Answer. I am prepared to testify the truth.

Question. Are you prepared to say that he was mistaken if he made such a statement?

Answer. I don't know anything about his statement, or what he mentioned when he gave his testimony.

Question. You can't at the present time give the items which aggregated the sum of fifty-one thousand dollars of expenditures?

Answer. I gave you those items as near as I could.

Question. You can't make up the deficiency?

Answer. I have already made it up.

Question. That didn't foot up that much?

Answer. If you will stop and put down it on a piece of paper, those items will foot up to that amount.

Question. I will do that if you will state them over.

Answer. There is fifteen thousand and three hundred and some odd dollars.

Question. For what is that?

Answer. That is the pipe that was laid in the ground before 1887; that is what that pipe would cost if put in the ground at the present

time and at the present prices, and then there are the improvements since 1887, amounting to twenty-five thousand and six hundred and some odd dollars. I mean to say the pipe and the laying of it is included in that.

Question. And now the connections?

426 Answer. The connections are twenty-five hundred dollars.

Question. And the stand pipes?

Answer. Seven hundred dollars.

Question. The ditches?

Answer. There was one ditch of thirteen hundred feet at one dollar and twenty-five cents, I think, but I wouldn't be positive. There were two *separate* ditches.

Question. And the other one?

Answer. And there was one ditch of twelve hundred feet at one dollar a foot.

Question. Now those are all the items, are they, in your estimate?

Answer. I wouldn't be positive; I think there was something else.

Question. Why do you think so?

Answer. Because I considered this more; I made it larger.

Question. Did you include water rights, real estate, and reservoirs, etc., in your estimate?

Answer. Without referring to my memorandum I couldn't tell you.

Question. Have you a memorandum of the estimate?

Answer. I have.

Question. Will you get that memorandum?

Answer. I have got it in my pocket.

Question. Will you take it out and let's see it?

Answer. Certainly. I think, however, that the stand pipe was added to that fifty-one thousand dollars, making fifty-two thousand.

Question. How did you happen to remember that now?

Answer. I happened to think about it.

Question. Have you seen your memorandum?

Answer. No; I just happened to think about it; that is all. There is the memorandum there; you can find out the whole business.

Question. When was this memorandum made?

Answer. I think it was last Friday or Saturday.

427 Question. Are you sure about that?

Answer. Yes, sir.

Question. Is this your own writing?

Answer. I wouldn't be positive about that; some is in my own writing and some is in Mr. Sutherland's writing.

Question. This estimate here gives fifty-two thousand five hundred and forty-three dollars.

Answer. Yes; taking the stand pipes out makes it that. I forgot about the stand pipes. I don't remember whether they were in or not.

Question. How did Mr. Sutherland make the same mistake, do you know?

Answer. I don't know.

Question. Do you know anything about the amount of insurance paid in this city yearly?

Answer. No; I wouldn't be positive. I went around to see these insurance men and got an estimate at the time, but I wouldn't be positive about it now.

Question. You haven't any recollection now of the amount of insurance paid?

Answer. No. We computed it at the time, but now I wouldn't be positive about it.

Question. In your direct examination you stated that it was estimated these fire-engines, chemicals, etc., that you were required to get, or that the chief thought necessary, would cost fifty or sixty thousand dollars?

Answer. In round numbers, an additional house, of course, which would be required if we added another fire station, and another set of drivers and horses, and lots of things which would be required, would more than amount to that.

Question. I understood you to say in your direct examination that it was not expected that you would supply consumers with water from city water works?

428 Answer. I said it was estimated that we could afford to put in water works without supplying any consumers.

Question. State how you reached that conclusion.

Answer. Simply because I calculated what we would have to pay for the interest on bonds would be saved by additional fire protection, and that the reduction in the cost of insurance and reduction in the cost of maintaining the fire department would be sufficient to pay this interest, without talking about anything else.

Question. Why did you think it would be necessary to put in a plant of one hundred and sixty thousand dollars, if this present plant could be replaced with so much smaller a sum?

Answer. Because I didn't know it at the time. I only found that out lately.

Question. You do know it now, do you?

Answer. Yes; of course, according to my estimate.

Question. You never made any estimate before of the value of this company's property?

Answer. Only to see what they could afford to sell it for.

Question. Did you pass this ordinance without knowing what water works would cost, to supply this city with water?

Answer. No, sir. We employed a competent engineer from the East.

Question. And he determined that it would cost a hundred and sixty thousand dollars to supply this city with water works, did he?

Answer. That is his report on record.

Question. How did you make this computation as to the number of gallons of water that would flow per minute from these different hydrants?

Answer. By tables compiled by Trotwine.

Question. Who is Trotwine?

Answer. An engineer, of course, with some reputation.

Question. How did you get the amount of pressure at these different hydrants?

Answer. How?

429 Question. Yes.

Answer. Well, Mr. Betz tried the hydrants, and the hydrant on Rose street registered thirty-two pounds, and the hydrant on the foot of Alder registered thirty-five pounds, and this hydrant in front of my shop figures, taking the same ratio, twenty-nine pounds, and we figured it at thirty.

Question. Did Mr. Betz tell you that those different hydrants registered that pressure?

Answer. He testified here, yes.

Question. What hydrants are those?

Answer. The one on Ninth and Rose, I think, was either thirty or thirty-two pounds, I wouldn't be positive which, and the one on Alder and Tenth street- was thirty-five pounds, and the one I figured was on Eighth and Main.

Question. When did you make this computation?

Answer. Last night and this morning.

Question. You are not sure that those tables are correct, and that you made a proper application of the rules given in the book?

Answer. I am pretty sure I made a proper application of the rules, and I think the tables are accurate enough.

Question. What are these tables purported to be?

Answer. The tables are computations on the flow of fire streams and discharges of pipes under the friction of different heads.

Question. Does it provide for friction?

Answer. I just said it did, didn't I?

Question. I am asking you, does the friction follow under different circumstances?

Answer. Well, I just said it did.

Question. But does it, I say?

Answer. Certainly.

Question. For different-sized mains?

Answer. Certainly.

430 Question. Does he give the different friction for different-sized mains?

Answer. Certainly.

Question. Do you know the sizes of the mains at the different places at which these hydrants are situated?

Answer. I am pretty familiar with them.

Question. Does the amount of friction have anything to do with the number of gallons of flow from the hydrants with certain pressure?

Answer. Certainly.

Question. What are the sizes of the mains at those different points?

Answer. Two of the hydrants are on four-inch mains.

Question. Which two?

Answer. And the other is a six-inch main except the connection of about one hundred feet, which is four inches.

Redirect examination :

Question. Trotwine is a standard authority used by engineers, is it not?

Answer. Yes.

Recross-examination :

Question. Are you an engineer?

Answer. I am.

Question. Are you a civil engineer?

Answer. No.

(Witness excused.)

(Signed)

JOHN L. ROBERTS.

GEORGE H. SUTHERLAND, being recalled as a witness on the part of defendant-, testified as follows :

Question. Mr. Sutherland, have you made a calculation as to the amount of water flowing from different hydrants in different parts of the city?

Answer. Yes, a few of them.

Question. Of what hydrants have you made a calculation?

431 Answer. One at the corner of Eighth and Main, one at Tenth and Alder, one at Fourth and Main, and one at Fifth and Main.

Question. Did you make any calculation of any others?

Answer. That is all we made any real computation on.

Question. In your computation, how much water did you find flows from the hydrant on Eighth and Main—how many gallons per minute?

Answer. I think two hundred and nineteen gallons, according to my recollection of the figures.

Question. Tenth and Alder?

Answer. Tenth and Alder was either one hundred and eighty-seven gallons or one hundred and ninety-two gallons.

Question. Have you got a memorandum of your calculation?

Answer. I think I can recollect it. Counting the friction one way, it was one hundred and eighty-seven gallons.

Question. At Fourth and Main?

Answer. At Fourth and Main it was five hundred gallons a minute.

Question. At Fifth and Main?

Answer. Two hundred gallons a minute, approximately.

Question. You took the pressure as testified to by Mr. Betz?

Answer. As to the pressure, I will say I took it at Fourth and Main and Fifth and Main from the pressure as I saw it in the paper as

given by the engineer from Spokane, and the pressure from the corner of Eighth and Main from the pressure taken by Mr. Betz, I think, because I didn't see any taken by this engineer at that place.

Question. As given by Mr. Huber, the Spokane engineer?

Answer. Yes; at Fourth and Main and Fifth and Main.

Question. What was the pressure at Fourth and Main?

Answer. I think it was twenty-two pounds to the square inch.

Question. What was it at Fifth and Main?

Answer. I think that was twenty-four pounds.

Question. How much water is required to supply one
432 stream from an ordinary steam fire-engine such as is used
in Walla Walla—how many gallons should it discharge per
minute, in your opinion?

Answer. It varies materially under different conditions, such as the pressure maintained at the engine and the length of the hose through which the stream is discharged or the water passes. It varies, of course, from what would be considered a fair fire stream to an extra strong one.

Question. How much water would be required to supply a fair fire stream?

(COUNSEL FOR COMPLAINANT: I will object to this question on the ground that it is incompetent, irrelevant, and immaterial, and the witness is not supposed to know.)

Answer. In thinking about the matter I always considered one hundred and fifty feet elevation, which creates sixty-seven pounds pressure per square inch, would give a fair fire stream, and that pressure at the steamer or hydrant would discharge through three hundred feet of hose one hundred and fifty-seven gallons per minute. Of course, an increase in the length of hose under the same pressure would decrease the discharge.

Cross-examination:

Question. Have you calculated the friction in three hundred feet of hose?

Answer. Yes, sir.

Question. What does that amount to?

Answer. I wouldn't be able to tell you exactly; approximately, it would cause a loss in pressure amounting to thirty-six pounds per square inch.

Question. How does it affect a stream of sixty-seven pounds pressure, to start in with?

Answer. It would reduce the discharge from what it otherwise would be.

Question. I understand you to say that sixty-seven pounds pressure, using three hundred feet of hose, would discharge one hundred and fifty-seven gallons per minute?

433 Answer. Yes, sir; using a one-inch nozzle.

Question. What would be the discharge through one hundred feet?

Answer. The discharge would be approximately one hundred and eighty gallons per minute.

Question. And through a ten-foot hose?

Answer. I suppose something over two hundred gallons.

Question. For a ten-foot hose there would be practically no friction?

Answer. The proportion in that case would be about twelve or thirteen pounds to every one hundred feet.

Question. That would be a very small diminution of the flow of a stream with a ten-foot hose?

Answer. As compared with none at all. Of course, it will be very distinct by actual measurement.

Question. With sixty-seven pounds pressure under the conditions you have stated, the hydrant would discharge about two hundred or a little over two hundred gallons a minute, wouldn't it?

Answer. Ask that question again.

Question. How many gallons a minute would the hydrant discharge with sixty-seven pounds water pressure, under the conditions you have stated, there being no friction?

Answer. The hydrant itself?

Question. Yes; that is the calculation you have been making, independent of the steam pressure of the engine.

Answer. The pressure maintained at the engine and not at the hydrant?

Question. How many gallons of water would be discharged from a hydrant with sixty-seven pounds pressure?

Answer. That would be governed entirely by the size and nature of the main through which the water came to the hydrant.

Question. How did you make these calculations?

Answer. By taking into consideration the size of the mains, the pressure and length of pipe through which water would flow.

434 Question. What was the size of the main you considered, four-inch?

Answer. Four-inch in some cases and six inches in others.

Question. Is your calculation based upon the presumption that the main is six inches?

Answer. Four-inch connection to the hydrant which I understand is the special size in each case, from main to hydrant.

Question. You have given a calculation of the number of gallons that will flow from these hydrants that you have examined under a certain pressure?

Answer. Yes.

Question. Have you also made calculations of the number of gallons that will flow under sixty-seven pounds pressure?

Answer. Yes, sir. I haven't given calculations of the number of gallons that will flow from a hydrant under sixty-seven pounds pressure.

Question. I thought you did.

Answer. No; not from the hydrant, but the discharge at the nozzle with different length hose, with hydrant pressure of sixty-seven pounds.

Question. Did you make any calculation as to the number of gallons that will flow where you use any other length of hose under sixty-seven pounds pressure?

Answer. No, sir.

Question. Can you by subtracting process?

Ans. I would have to know the length of hose in this case.

Question. Can you make the calculations?

Answer. I can make a calculation as to how much a hydrant would discharge or flow or deliver if there was a pressure of sixty-seven pounds.

Question. I ask you to do it.

Answer. I can't tell you just from memory.

Question. You were calculating with three hundred feet of hose, were you?

Answer. I calculated what the hydrant would furnish to the engine, or flow or discharge under the pressure that I have named.

435 Question. Are you and Mr. Roberts in partnership?

Answer. No, sir.

Question. You made these calculations together, did you?

Answer. We did make some calculations together.

Question. These as well as the estimate of the number of miles of pipes that had been laid, or the cost and expenditures?

Answer. Yes; we did some figuring together as to the discharge of these hydrants.

Question. Did you use the same tables that Mr. Roberts did?

Answer. Yes, sir; when we were figuring.

Question. I understood that he got the number of pounds pressure from Mr. Betz' statement, and you yours from Mr. Roberts' statement as taken in the newspapers?

Answer. While I was figuring alone on those estimates, I referred to and used the figures as given by Mr. Huber for those hydrants on the corner of Fourth and Main and Fifth and Main, and the pressure that was used or considered, when Mr. Roberts and I figured together, was that which was taken from both.

Question. I don't understand that.

Answer. I say the pressure that was considered when Mr. Roberts and I figured together was the pressure as given in both cases. We might have considered the pressure as given by Mr. Huber or as given by Mr. Betz. Mr. Betz took the pressure on some of the hydrants where Mr. Huber did not, and *vice versa*.

Question. Do you know whether or not Mr. Huber found the same pressure that Mr. Betz did at the different hydrants?

Answer. I don't know in regard to that.

Question. You are sure that you got the pressure at these different hydrants from the newspaper statements as to what Mr. Huber had testified, and Mr. Roberts got his from Mr. Betz' statement?

Answer. Mr. Roberts and I agreed as to the pressure in calculating and figuring together, and I referred, to refresh my memory, to the pressures given by Mr. Huber in the newspapers.

436 Question. What formula did you use to calculate the number of gallons flowing from the hydrants under the conditions you have described?

Answer. As there are tables in existence saving a great deal of figuring, I used tables which are compiled upon the results of Trotwine's formulas.

Question. You can figure this out yourself without a table or tables?

Answer. It can be done by formulas.

Question. What formulas?

Answer. Of an engineer named Leslie. I can give it, I think.

Question. Well, give it.

Answer. To ascertain the number of gallons discharged by a smooth straight pipe, take the hydraulic mean radius of the pipe, which is one-fourth the diameter, in decimal parts of a foot, and divide that by the head in feet divided by the length in feet, extract the square root and multiply by one hundred, which gives you the velocity of the stream per second, and the number of gallons is then obtained by multiplying the velocity by the contents of the different — of the pipe in gallons.

Question. Then the pressure has nothing to do with it, has it—there is nothing about pressure in that formula?

Answer. The head in feet means the pressure or produces pressure.

Question. Head in feet—what does that mean?

Answer. It is the amount of elevation between the point of delivery where the water discharges and the surface of the water where it comes from.

Question. Now, the elevation regulates the amount of pressure always, does it not?

Answer. Yes; governed by other things. The elevation, unless there are other drafts of water from pipes conveying the water, will indicate a certain amount of pressure.

437 Question. You and Mr. Roberts agreed on your estimates in this case as well as on your estimate of the expenditures of the Walla Walla Water Company in laying down their pipes and mains?

Answer. Yes, sir; we finally agreed.

Question. You exactly agreed in either case, didn't you, as to the cost of the pipes and mains laid down and as to the number of gallons discharged by the hydrants?

Answer. As to the main figuring. When Mr. Roberts and I figured together we agreed practically in the main.

Question. Didn't you agree in the main?

Answer. Of course, we differed some in talking it over as to the value of the material, but not as to the work; but we finally agreed.

Question. When was this estimate made?

Answer. It was made between last Saturday evening and Monday morning.

Question. And you and Mr. Roberts agreed that the pipes and

mains which had been laid since 1887 by the Walla Walla Water Company would cost, at present prices, fifty-one thousand dollars?

(Mr. GILMAN: I will object to that question, on the ground that it is not proper cross-examination.)

Answer. I will state this: that after Mr. Roberts and I had been figuring the result of the figuring was that the total cost of replacing the water works at present, or the pipes and mains, including the excavations and laying the pipes and mains, the gate valves, stops, supply pipes to the reservoirs, not including the stand pipes, which we afterwards added, made fifty-one thousand dollars.

Question. You heard Mr. Roberts' testimony this morning?

Answer. Yes; I heard some testimony after I came up a few minutes ago.

Question. You remember, do you, that you testified this way the other day—you stated that the expenditures made by the water company for laying pipes and mains amounted to fifty-one thousand dollars?

Answer. My opinion is that by reference to the testimony
438 it will be found that I testified just as I have now; that it isn't since 1887 that it has cost so much, but the whole system as it is now at present or as given to me as we estimated it. In fact, I don't think I was asked to segregate the cost before and after.

Question. Where did you get your knowledge of the pipe that had been laid?

Answer. From the memorandum that was handed to me when I testified before here and as called off by Mr. Roberts.

Question. Who prepared this memorandum? Do you know?

Answer. I do not.

Question. You simply took a memorandum which Mr. Roberts handed you and made your estimate of the expenditures from that memorandum?

Answer. Yes; and as called off by Mr. Roberts.

Question. That is the only knowledge you have as to the number of miles of pipe laid by the water company and as to the size and kind of pipe?

Answer. With the exception that I referred to, the map that is said to represent the mains as they are laid.

Question. That is, Mr. Roberts told you it was a correct map?

Answer. It is a map that he showed me as being a map showing the mains, and I measured some of the mains as shown on the map.

Question. How did you measure them?

Answer. I measured them with a rule.

Question. On the map, you mean?

Answer. Yes, sir; on the map.

Redirect examination:

Question. You used this map which has been introduced in evidence and the memorandum which was introduced in evidence?

Answer. Yes, sir.

(Witness excused.)

(Signed)

GEO. H. SUTHERLAND.

439 CHARLES DE MOSS, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. Do you reside here in Walla Walla?

Answer. Yes, sir.

Question. Are you a member of the fire department?

Answer. No, sir.

Question. Were you present at the City Hotel fire?

Answer. Yes, sir.

Question. This summer?

Answer. Yes, sir.

Question. Did you take any part in extinguishing that fire?

Answer. I did.

Question. Did you handle the hose?

Answer. I handled the nozzle for a while.

Question. Do you remember, during that fire, of the telegraph poles starting to burn?

Answer. I do; yes.

Question. You attempted to extinguish them?

Answer. I did.

Question. While you had hold of the hose?

Answer. Yes, sir.

Question. Did you stop it?

Answer. The stream wouldn't carry all the way up.

Question. How high were the poles?

Answer. Thirty or thirty-five feet.

Question. Are you acquainted with Y. C. Blalock?

Answer. I am.

Question. Did you see him that night?

Answer. I did that morning at the fire.

Question. Did you hear him give any orders?

Answer. I did.

Question. What did he say?

Answer. He said, You might as well quit, for it is doing no good.

440 Question. Didn't he order you to get this off from the engine?

Answer. No; he was right there between there and the house, and he said, "You may as well quit that, for it is doing no good."

Question. What did he mean?

Answer. I suppose he meant to detach it from the engine.

Question. Why did he say it wasn't doing any good?

Answer. Because there was no water there, I suppose. There was no stream to amount to anything.

(Witness excused.)

(Signed)

CHARLES DE MOSS.

PETER KAUFFMAN, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. Are you a member of the Walla Walla fire department, Mr. Kauffman?

Answer. Yes, sir.

Question. In what capacity did you act while a fireman?

Answer. I am first assistant now.

Question. What position do you occupy at fires?

Answer. As fireman.

Question. Do you handle the hose?

Answer. Yes, sir.

Question. How long have you been a fireman?

Answer. Five years.

Question. Have you been present at most of the fires during that five years in Walla Walla?

Answer. Yes, sir.

Question. Have you taken an active part in extinguishing them?

Answer. Yes, sir.

Question. Have you observed the supply of water at all these fires, whether or not the water supply has been sufficient?

Answer. I have; it is not sufficient.

Question. How many streams of water do they usually throw at fires?

Answer. Three or four.

441 Question. Well, how much force would they be able to get with three or four streams?

Answer. When there are four streams you can't break a window-light eighteen or twenty feet away.

Question. You can't with any one of the four streams?

Answer. No, sir; with neither one of the four streams.

Question. Is that a necessity repeatedly?

Answer. Yes, sir.

Question. You said as a general thing they wanted four streams?

Answer. Yes, sir.

Question. Were you present at the Alder Street fire?

Answer. Yes, sir.

Question. Were you at the end of the hose there?

Answer. Yes, sir.

Question. Did you try to break any windows there?

Answer. Yes, sir.

Question. Were you able to do so?

Answer. No, sir.

Question. How far was the window away?

Answer. I was at the back part of the building, about sixteen feet from the building, and I couldn't break the window-lights.

Question. Did you throw a full stream on it?

Answer. Yes, sir.

Question. How many streams were playing on that fire that night?

Answer. Four.

Question. Two from each steamer?

Answer. Yes; two from each steamer.

Cross-examination:

Question. Were you present at the Stine House fire?

Answer. Yes, sir.

Question. Did you try to break any windows there?

Answer. Yes, sir.

442 Question. Could you do it?

Answer. Yes, sir.

Question. Did you break a window?

Answer. Yes, sir.

Question. At how many fires were you present where you were not able to break windows?

Answer. We couldn't break any down at the City hotel nor we couldn't break any at the Alder Street fire.

Question. What other fires have you attended?

Answer. I have been to -very one that has been along.

Question. Except the Stine House fire?

Answer. I was at the Stine House fire.

Question. You say at how many fires you couldn't break the windows?

Answer. We couldn't break them at any.

Question. You didn't break them at the Stine house?

Answer. Yes, sir.

Question. That is still an exception?

Answer. Yes, sir.

Question. Was the hose on the ground at the time you tried to break the window at the Alder Street fire?

Answer. In the rear?

Question. Yes.

Answer. Yes, sir.

Question. Was it pretty close up to the building?

Answer. Yes, sir.

Question. Was it very close?

Answer. Sixteen or eighteen feet.

Question. Was the window in the first or second story?

Answer. The first story.

Question. How long did you try to break it?

Answer. We were playing on it there three or four minutes.

Question. Was the building on fire at this time, with flames all around it?

443 Answer. Yes, sir.

Question. Can't you do, as a rule, as much with four streams as with two at these fires?

Answer. No, sir; you don't have the pressure.

Question. I don't mean whether each of the four streams is as good as two, if you only used two streams, but can't you do as good work with four streams as though you just used two streams?

Answer. We can do as much good with two streams as with a

thousand, if we had them. Ever since the Stine House fire we have been using one engine.

Question. Why is it that an engine can do better service with two streams? How do you know it would?

Answer. They haven't got the pressure.

Question. Why are four streams actually used if it would be better with two?

Answer. If we have the pressure on two it is better with two than four where you haven't got any pressure.

Question. That is the only answer you have got for that question, is it?

Answer. Yes, sir.

Question. Did you ever make an estimate of the height which these streams reach that you used?

Answer. No; not exactly.

Question. They would go over a two-story building without any trouble?

Answer. Yes; they could squirt on top of them.

Question. Could they squirt over a two-story building?

Answer. Not very far.

Question. Would they go over without any trouble?

Answer. When four streams were on?

Question. Yes.

Answer. No, sir.

Question. Never do?

Answer. Sometimes, but they never go over very far.

444 Question. Did they at the Alder Street fire?

Answer. Did they squirt over the top of that building? No, sir; they didn't.

Question. Do you know whether the hose burst at the Alder Street fire?

Answer. Whether there was a hose burst?

Question. Yes.

Answer. No; I couldn't say positively whether there was any hose burst that night or not.

Question. Did you hear of any?

Answer. No; I didn't hear of any.

Question. Do you know anything about whether one burst or not?

Answer. No; not positively.

Question. What do you mean by not positively?

Answer. I am not sure whether any burst.

Question. You have no idea that there was?

Answer. No; I have not.

Redirect examination:

Question. Mr. Kauffman, from your experience as a fireman would you say a stream of water that wouldn't break a common window-pane sixteen feet away would be of much use in extinguishing a fire?

Answer. No, sir.

Recross-examination :

Question. You are simply a volunteer fireman, are you not ?

Answer. Yes, sir.

Question. How long have you been in the company ?

Answer. About five years.

Question. Were you ever a regular paid employee of the fire department ?

Answer. No ; I never was.

(Witness excused.)

RALPH WHITE, being first duly sworn as a witness on the part of defendant, testified as follows :

Question. Are you a resident of Walla Walla ?

445 Answer. Yes, sir.

Question. You are a member of the fire department ?

Answer. Yes, sir.

Question. How long have you been a member ?

Answer. About three years.

Question. What position do you occupy in the fire department ?

Answer. I am generally on the nozzle at a fire.

Question. You say you have been a member nearly three years ?

Answer. Yes ; nearly three years.

Question. Have you attended most of the fires that have occurred in Walla Walla during the last three years ?

Answer. I have.

Question. Have you observed the water supply at all of these fires during the last three years ?

Answer. Most all.

Question. Has the water supply been sufficient ?

Answer. No, sir ; it has not.

Question. What was the fault ?

Answer. There was not enough pressure.

Question. Did you ever try to break any window-panes with a stream of water from the engine ?

Answer. At the Alder Street fire we were standing across the sidewalk and couldn't break a window across the sidewalk.

Question. How far away ?

Answer. Probably twelve feet.

Question. Did you throw the stream squarely at the window ?

Answer. Yes, sir ; I did.

Question. Did you observe this same difficulty at any other fire ?

Answer. Yes ; at the — fire two years ago.

Question. Did you try to break windows then and failed ?

Answer. Yes, sir.

Question. The stream was attached to the steamer, was it ?

Answer. Yes, sir ; it was.

446 Question. How many hose were attached to that same steamer ? Do you know ?

Answer. One besides the one I was on.

Question. Two streams, then ?

Answer. Yes, sir.

Question. How far away was the hose ?

Answer. About twenty feet.

Question. And you couldn't break the glass ?

Answer. No, sir.

Question. In your opinion, would a stream that wouldn't break a pane of glass at that distance be of much use in operating at a fire ?

Answer. No, sir.

Cross-examination :

Question. Do you know how the glass at the Alder Street fire was broken ?

Answer. Yes, sir; by a stick.

Question. Were there any blinds over the window ?

Answer. No, sir.

Question. None at all ?

Answer. No, sir.

Question. Who broke the glass with a stick ? Do you know ?

Answer. I wouldn't say for sure, but I think it was Jeff. Faucette.

Question. You were there when it was broken and saw him do it ?

Answer. Yes, sir; I was.

Question. He knows as much about it as you do, don't he ?

Answer. I guess he does; he was there.

Question. He did the breaking ?

Answer. I wouldn't say for sure. I think he did.

Question. If he broke the glass he knows as much about it as you do, whether there were blinds there or not ?

Answer. Yes, sir.

447 Question. Did that stream go over the Alder Street house ?

Answer. No, sir.

Question. Not at all ?

Answer. No, sir; it hit about the top of the cornice. They couldn't throw it over the top of the building.

Question. How many times did you try to throw that stream over the building ?

Answer. Three or four times.

Question. And they never did it ?

Answer. No, sir.

Question. Were you at the Stine House fire ?

Answer. No, sir; I was not.

Question. Which engine were you on at the Alder Street fire ?

Answer. On the corner of Second and Alder street.

Question. Where was the other one set ?

Answer. On Third and Alder.

Question. Were you fireman or hoseman ?

Answer. Fireman and hoseman both.

Question. At the Alder Street fire ?

Answer. I was on the nozzle.

Question. That was where you had the most difficulty as to the water supply?

Answer. Yes, sir.

Question. When you say there was not sufficient pressure you mean there was not as big a stream as you wished to have?

Answer. No; not by any means.

Question. What do you mean?

Answer. I mean we ought to have more water than we did have.

Question. Do you know anything about the pressure at the Alder Street fire?

Answer. I know it wasn't sufficient to break a window.

Question. You mean the stream wasn't sufficient?

Answer. I mean the pressure wasn't.

Question. How do you know it wasn't?

448 Answer. I tried it.

Question. Do you know anything about the condition of the engine?

Answer. It seemed to work all right.

Question. You were on the nozzle, some distance from the engine?

Answer. Yes; one hundred yards, I suppose.

Question. You don't know how the engine worked?

Answer. I wasn't around there.

Question. You were engaged in trying to put out the fire?

Answer. Yes; I was.

Question. You don't know how the engine worked?

Answer. I wasn't around it. I couldn't swear as to that. I suppose it worked all right. I wasn't there.

Question. You are a volunteer fireman?

Answer. Yes.

Question. You have never had any training as a fireman?

Answer. No, sir.

Question. You simply joined the company for your amusement?

Answer. Not particularly for amusement. I don't see very much amusement in it—getting out some cold nights.

Question. A fire is a good thing on a cold night, isn't it?

Answer. It is according to where the fire is.

(Witness excused.)

(Signed)

RALPH M. WHITE.

H. D. HENROID, being first duly sworn as a witness on the part of defendant, testified as follows:

Question. You reside in Walla Walla, Mr. Henroid?

Answer. Yes, sir.

Question. How long have you lived here?

Answer. Six years.

Question. What has been your business during this six years?

Answer. Hotel business.

Question. Where is it situated?

449 Answer. The City hotel and the Delmonico.

Question. Where are they situated?

Answer. The City hotel was on the corner of Fourth and Ross street and the Delmonico is between Fourth and Fifth street on Main.

Question. Were both of those buildings fully supplied with water pipes for the purpose of carrying water to the second story?

Answer. Yes, sir.

Question. State whether or not you were able to get water on the second story.

Answer. Well, there were times when water was scarce upstairs.

Question. What do you mean by scarce?

Answer. There wasn't any water at times in the afternoon.

Question. It wouldn't come upstairs?

Answer. No; during July and August whenever we used water downstairs it wouldn't run upstairs.

Question. Was that true of both hotels?

Answer. Yes.

Question. That was true of the City hotel?

Answer. Yes.

Question. And also of the Delmonico?

Answer. Yes, sir.

Question. How long did you run the Delmonico?

Answer. About fifteen months, I think, or sixteen months.

Question. Did this fact that you couldn't get water on the second floor result in any inconvenience to you?

Answer. Well, yes; sometimes.

Cross-examination:

Question. Do you know what pipe connections there were between the Delmonico hotel and the main of the company—whether there was one set of service pipes or two?

Answer. No; I don't know how about that.

Question. Do you know whether or not there were different connecting pipes between the upstairs and the downstairs?

450 Answer. I don't know anything about that.

Question. Do you know why it was water didn't run upstairs when it was running downstairs?

Answer. No; I can't say.

Question. Have you no idea at all?

Answer. No.

Question. How long ago did you leave the Delmonico?

Answer. In July.

Question. Of this year?

Answer. Yes, sir.

Question. Did that trouble continue all the time that you were in the Delmonico?

Answer. Well, yes; in July and August is all.

Question. July and August is about all—that is, during the sprinkling season?

Answer. I suppose so.

Question. That was only during the sprinkling season, in the afternoon?

Answer. I don't know just what hours.

Question. It was, as a matter of fact, only in the afternoons, was it not?

Answer. Principally in the afternoons; yes.

Question. During the rest of the day it ran upstairs and downstairs without any trouble?

Answer. Yes, sir.

Question. It was no serious inconvenience—the water being shut off upstairs during part of the day during the irrigation season—was it?

Answer. It was an inconvenience occasionally. When they wanted water they couldn't get it.

Question. You haven't had any stationary wash-stands or anything of that kind in the different rooms upstairs?

Answer. No.

Question. You could get the water, you say, upstairs in 451 the morning, couldn't you, without any inconvenience?

Answer. Yes, sir.

Question. And that was customary, wasn't it?

Answer. If the roomers wanted any water, of course they would have to go downstairs.

Question. That is the only inconvenience there really was?

Answer. Yes.

Redirect examination :

Question. Did you have any water-closets or urinals upstairs?

Answer. Yes.

Question. You needed a supply of water for them?

Answer. Yes, sir.

(Witness excused.)

(Signed)

H. D. HENROID.

— RODGERS, being first duly sworn as a witness on the part of defendant-, testified as follows :

Question. Where do you reside, Mr. Rodgers?

Answer. On the corner of Rose and Touchet street.

Question. How long have you resided there?

Answer. About thirteen years.

Question. Are you a tax-payer, Mr. Rodgers?

Answer. Yes.

Question. And you have been during all that time?

Answer. Yes, sir.

Question. Do you obtain your supply of water from the Walla Walla Water Company?

Answer. Yes, sir.

Question. How long have you had connections with them?

Answer. I commenced using water for the yard as soon as they got the water in up our way. I think that has been about five or six years, probably, or maybe more; I don't remember exactly.

Question. Well, have you been well supplied with water there during all that time, Mr. Rodgers?

Answer. No; not all the time. There have been times
452 that I couldn't get water even for the house use.

Question. When was that?

Answer. This summer two years ago.

Question. You depend on the water company for your supply for domestic and irrigation purposes, do you?

Answer. Yes, sir.

Question. Couldn't you get any water?

Answer. None at all.

Question. What did you do for water?

Answer. We went to Marshall Robinson's and got it out of his well.

Question. Across the street?

Answer. Yes, sir.

Question. How long did you continue to do that?

Answer. Two or three hours. There have never been but two or three times that summer. Last summer and this summer there has been plenty of water for house use.

Question. How about irrigation?

Answer. We didn't use it this summer.

Question. Did you before that?

Answer. Yes.

Question. How was it then?

Answer. We scarcely had any.

Question. Didn't it have much force?

Answer. We couldn't throw it up to the chamber window on the second floor.

Cross-examination :

Question. What do you mean—you couldn't throw it there with a hose?

Answer. Yes, sir.

Question. You had no special reason to throw it with a hose, had you?

Answer. Nothing, only to wash windows or something of that kind.

453 Question. You have water upstairs, have you?

Answer. No, sir; there are no connections upstairs.

Question. Have you had any use for water for sprinkling purposes during the last two years?

Answer. —.

Question. Last year you didn't use it, did you?

Answer. Summer before last I did.

Question. Since the mains were laid on Touchet street you have had no difficulty at all in getting sufficient water for domestic purposes, have you, since those extensions were made?

Answer. I forgot whether it was that summer or not.

Question. It was after the trouble you speak about when you had to go to the neighbors for water?

Answer. That is all unless I was notified through the papers that they were going to turn it off and I would be prepared for it.

Question. I understand that these three or four times didn't last more than three or four hours at a time?

Answer. I should say it did.

Question. That is the only trouble you had?

Answer. That is all.

(Witness excused.)

MARSHAL MARTIN, being first duly sworn as a witness on the part of defendant-, testified as follows:

Question. You reside in Walla Walla?

Answer. I do.

Question. How long have you resided here?

Answer. Over twenty-four years.

Question. You own property in Walla Walla?

Answer. I do.

Question. Are you a tax-payer on real estate?

Answer. I am.

Question. Where is your residence situated?

454 Answer. On the corner of Sixth and Main street.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. Yes, sir.

Question. For domestic and irrigation purposes?

Answer. For domestic purposes, but not for my lawn now.

Question. Have you ever had water for irrigation purposes?

Answer. I have.

Question. When was it that you used water for irrigation purposes?

Answer. I have taken water ever since J. C. Isaacs laid a main down Main street for domestic and irrigation purposes until a year ago, in May, I discontinued water for irrigation.

Question. During the last few years what has been the nature of the supply furnished? Has it been sufficient or insufficient?

Answer. For domestic purposes I have no complaint; for irrigation it has been inadequate.

Question. How was the force—sufficient or otherwise?

Answer. Well, when the court-house wasn't turned on and when the neighbors were not using it we had plenty for irrigation. We never had force enough to throw it to the second-story windows.

Question. Within the hours allowed you for irrigation did you find you were able to keep your lawn under proper cultivation?

Answer. No, sir; not what we ought to have. We lost a great many flowers, and trees suffered and grass suffered for lack of water.

Question. Your residence is in the lower end of town, is it not?

Answer. Yes.

Question. How about the main ?

Answer. I am right on the end of the Main Street main.

Question. Is that one of the largest mains ?

Answer. It is six-inch to Fourth street and from there down it is four-inch.

455 Question. From your own knowledge, as far as you know yourself, isn't the force greater in that portion of town than in any other ?

Answer. I should judge it would be—it ought to be.

Question. Haven't you observed that it is ?

Answer. Well, I never observed it only by taking the hose and seeing how high I could throw it, and I couldn't throw it to the second-story windows.

Question. Don't you know that if you haven't sufficient force in your yard that there are other different portions of the city that have less force ?

Answer. I should think so. They are on a higher elevation than I am.

Question. Is the neighborhood in which you live quite thickly settled ?

Answer. Yes, sir.

Cross-examination :

Question. How large a lot have you ?

Answer. I have two lots, which combined are one hundred and twenty feet square.

Question. How high did this stream of water reach when you tried to throw it on the windows of your second story ?

Answer. I don't know how high. I didn't measure it.

Question. It is never necessary to wash the windows with a hose, is it ?

Answer. I think it was the regulations of the water company at that time. I don't know how it is during the last two years. We could wash the lower windows with the hose, but not the upper windows.

Question. You have no trouble about the lower ones ?

Answer. No.

Question. Do you use a sprinkler ?

Answer. I did.

Question. Did it turn ?

Answer. Sometimes, and sometimes it did not.

456 Question. Wouldn't a stream that would almost reach the windows in the second story of your house turn a sprinkler ?

Answer. I don't know ; sometimes the sprinkler was running nicely and sometimes it was not.

Question. During what part of the year didn't it run ?

Answer. During the hot season, in the latter part of July and August.

Question. How long has your pipe been in ?

Answer. Ever since Mr. Isaacs put it in ; I can't tell when, but it was in the early part of the eighties.

Question. Was it about 1887 or before that?

Answer. Oh, yes; it was before that.

Question. Are you at the end of the Main Street main?

Answer. I am on Sixth street.

Question. Where is the end of the Main Street main?

Answer. Oh, I don't know.

Question. I thought you said you were at the end of the Main Street main?

Answer. No; I didn't say I was at the end of the Main Street main.

Question. Do you know how many sprinklers there are at the court-house above your place?

Answer. No; I don't know how many.

Question. Is the grass kept green there?

Answer. It is very green there, and they don't seem to be limited to any hours for sprinkling.

Question. Have they always used water whenever they wanted it?

Answer. They always did.

Question. How many hours a day do you sprinkle?

Answer. I haven't sprinkled any for two years.

Question. Before that time?

Answer. Oh, we had a limit from five o'clock in the morning until ten—five hours.

Question. Did you sprinkle during all of those hours?

Answer. Sometimes we missed an hour in the morning, or half an hour.

457 Question. Well, since two years ago you have never had any trouble about water, have you?

Answer. Not for domestic purposes.

Question. Have you for irrigating purposes?

Answer. We haven't used any for irrigating purposes during the last summers.

Question. What is your business?

Answer. I am a blacksmith.

Question. Are you a member of the council?

Answer. I am.

Question. You are interested in this water suit?

Answer. I am, very deeply.

Redirect examination:

Question. What are the occasions for your interest in this water suit?

(This question was objected to by counsel for complainant, on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. My interest is in having a plentiful supply of water for fire purposes and for irrigation purposes, to decrease my rates of insurance, and the safety of the city.

Question. You have no interest except the city's safety?

Answer. That is all.

(Witness excused.)

(Signed)

MARSHALL MARTIN.

Defendant- rests.

LE F. A. SHAW, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. You are a resident of Walla Walla?

Answer. I am.

Question. How long have you resided here?

Answer. Some seventeen years or more.

458 Question. What is your business?

Answer. I am an insurance agent.

Question. In what part of the city do you live, with reference to First street?

Answer. I live on the corner of Grove and Washington street.

Question. How far above First street?

Answer. I live about half a mile east of First street, I should judge.

Question. Do you obtain water from the Walla Walla Water Company?

Answer. I do.

Question. What has been the nature of your supply for the last few years?

(COUNSEL FOR DEFENDANT:- We object to that question, on the ground that it is not proper rebuttal.)

Answer. Well, I hardly know how to answer the question.

Question. What I mean is, Have you or have you not had an adequate, ample supply of water for domestic and irrigation purposes during that time?

(Same objection as above.)

Answer. In order to let the court or yourself understand, I suppose I ought to tell what the supply has been?

Question. Go on.

Answer. I was supplied by an inch and a quarter pipe from the corner of Park and Birch streets. I think about eight hundred feet of pipe was laid by Mr. Isaacs to supply my place with water. He laid an inch and a quarter pipe for about eight hundred feet to furnish me with water, but the supply was light. After a number of years Mr. Winans, Mr. Sharpstein, and others formed a new water company and erected a water plant up above us, in Reed's addition, and run a main down through Washington street, which I tapped; then for two years, I think, I obtained water from that company, and afterwards the Walla Walla Water Company absorbed the Sharpstein-Winans Company, and then I had
459 them lay a new main for me up Washington street. They laid an inch and a half pipe up as far as my gate, about half

way along my property, on Washington street, and allowed me to tap that main also, and from the two supplies from them I have water enough to irrigate my lawn and for my house use.

(Witness excused.)

(Signed)

LE F. A. SHAW.

GEORGE H. CHAMBERLAIN, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. What is your business, Mr. Chamberlain?

Answer. The retail lumber business.

Question. How long have you resided in Walla Walla?

Answer. A little over four years.

Question. Are you furnished water by the Walla Walla Water Company?

Answer. I am.

Question. How long have you been furnished water by them?

Answer. I have always used their water since I have been here.

Question. Is your supply of water adequate and ample for domestic and irrigation purposes?

(COUNSEL FOR DEFENDANT:- I object to that question, on the ground that it is not proper rebuttal.)

(Question withdrawn.)

Question. In what part of the city do you reside?

Answer. On Dr. Newell street, No. 328.

Question. Near what street?

Answer. Near Palouse, about two blocks above First street.

Question. Do you know how far you are below the reservoir of the water company?

Answer. No, sir.

Question. Have you ever had any difficulty in obtaining a sufficient supply of water for domestic and irrigation purposes?

Answer. I have not during the entire summer months, but during July and August I had very little domestic use for water, for my family were out of town. I had sufficient supply to keep my lawn in shape all summer.

Question. How long have you lived where you are living now?

Answer. Since the first of March last.

Question. You have only lived there during the current year of 1894?

Answer. That is all.

Question. You don't know what the water supply was before there?

Answer. No, sir.

(Witness excused.)

(Signed)

GEO. H. CHAMBERLAIN.

G. P. WINANS, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. Do you reside in Walla Walla?

Answer. Yes, sir.

Question. What is your business?

Answer. I have charge of the Walla Walla Club rooms in the Rees-Winaus building.

Question. Are you familiar with the water supply of that building?

Answer. I am.

Question. Where is it situated?

Answer. On the corner of Second and Main street.

Question. Is there an ample and adequate water supply in that building?

Answer. I have only had charge of it a year. There has been since I have had charge of it.

Question. It is a three-story building, isn't it?

Answer. Yes; three stories.

Cross-examination:

Question. Does the water at all times run on the third floor?

Answer. It has since I have had charge of the building.

Question. When did you commence?

461 Answer. It will be a year the first of November.

Question. Then you haven't had charge of that building during the summer months, except in 1894?

Answer. Just this summer of 1894.

Question. Hasn't there been an unusual amount of rainfall during the year 1894?

Answer. I don't know anything about that. I thought it was pretty dry.

Question. Has the year 1894 been as dry as 1893 and 1892?

Answer. I should say it had been dryer in 1894.

— Has there been as much rainfall in 1893 as in 1894?

Answer. I would say there has been as much as in 1894.

Redirect examination:

Question. Did you have special reference to the summer months or the year around?

Answer. The summer months.

Recross-examination:

Question. Is there a pump in your building used to pump water into the third story?

Answer. No, sir.

Question. Has there not been since you have been there?

Answer. Not to my knowledge.

Question. Do you know?

Answer. No; I don't know of any pump being there at all.

Question. Do you know whether or not there is a pump there?

Answer. There is a pump connected with the furnace, but it has nothing to do with the Walla Walla Water Company.

Question. You simply have charge of the club-rooms?

Answer. I have charge of the building now, but I have nothing to do with the furnace-work.

Question. Or with the water supply?

Answer. Well, I have charge of the water supply for domestic purposes—water-closets, etc. I see that the building is kept clean.

Question. Would you be willing to swear that there is no pump there to furnish water to the third story?

Answer. I would.

(Witness excused.)

(Signed)

G. P. WINANS.

462 J. M. MOORE, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. Do you reside in Walla Walla?

Answer. Yes, sir.

Question. How long have you resided here?

Answer. Since 1870.

Question. Where do you live?

Answer. On Sumac street between Second and Third.

Question. How long have you lived there?

Answer. Since that time—since 1870.

Question. Does Mr. Dooley live by the side of you?

Answer. Mr. Dooley lives across the street, on the corner, a little above me.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. Yes, sir.

Question. Have you an adequate and ample supply for irrigation and domestic purposes?

Answer. Yes; I never had any difficulty at all.

Question. You haven't had any difficulty in the last few years in your water supply?

Answer. No, sir; but sometimes the supply has been a little stronger than at other times. I have always had a good supply.

Question. You have never had any cause for complaint and have never made any complaint?

Answer. No, sir.

Cross-examination:

Question. How long have you been living there?

Answer. Ever since 1870.

Question. How many stories high is your house?

Answer. Two stories.

Question. Have you water in the second story?

Answer. No, sir.

Question. Is there sufficient force to take water to the second story?

463 Answer. I guess there is, if I had any occasion to put it there.

Question. Isn't it customary in most houses to have a bath-tub in the second story?

Answer. In the houses of later date, but this was built before the day of water works, when we didn't have those luxuries.

Question. As you understand a modern house, it is customary for water-closets and bath-rooms to be constructed in the second story, is it not?

Answer. In a good house, yes, sir.

Question. Your house was constructed some years ago?

Answer. Yes, sir.

Question. You are a brother of Miles C. Moore, a prominent stockholder in the Walla Walla Water Company?

Answer. Yes, sir.

(Witness excused.)

(Signed)

J. M. MOORE.

HARRY A. REYNOLDS, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. Do you reside in Walla Walla, Mr. Reynolds?

Answer. I do.

Question. How long have you resided here?

Answer. About twenty-five years or more.

Question. Do you own any resident property in the city?

Answer. I do.

Question. Where is that property situated?

Answer. On the east side of Second street between Rose and Sumach.

Question. Is that property near Mr. Dooley's property?

Answer. It is opposite, or nearly so.

Question. Are any of your houses on a higher elevation than the house of Mr. Dooley's?

Answer. Very slightly higher, I should imagine.

464 Question. Are you furnished with water by the Walla Walla Water Company?

Answer. Yes, sir.

Question. How long have they furnished water?

Answer. At my mother's home?

Question. I mean at this particular part of town.

Answer. Six years at this particular part of town, but as far back as I can remember generally.

Question. Is that supply of water adequate and ample for domestic and irrigation purposes?

Answer. At present it is; yes, sir.

Question. Has it been for some time past?

Answer. Well, for irrigation purposes the supply has been light sometimes, particularly in the summer time.

Question. Have you had sufficient water to keep your place in good order?

Answer. Yes, sir.

Cross-examination :

Question. Your supply has not been what you would consider sufficient for irrigation purposes for the past year?

Answer. Yes ; it has.

Question. Is that supply throughout the city ?

Answer. I can't say positively about that, except I have noticed that those people throughout the city who have taken good care of their lawns have just as nice lawns as in any city.

Question. Were you a member of the council since 1893 ?

Answer. I think my time expired in July, 1893 or 1892.

Question. Were you one of the members of the council at the time this question of having the city own its own water works was agitated ?

Answer. It was not agitated to any great extent while I was in the council.

Question. Were you a member of the council at the time the ordinance was passed and it was put to a vote of the people ?

Answer. No, sir.

465 Question. Do you know when the ordinance was passed ?

Answer. I couldn't say positively ; no, sir.

Question. Well, were not you a member of the council at the time the ordinance was passed submitting the question of city sewers and city water works to a vote of the people, in 1891 or 1892 ?

Answer. I think I was ; yes, sir ; when the whole question was submitted.

Question. Did you vote for that ordinance ?

Answer. I couldn't say positively now whether I did or not.

Question. You don't recollect whether you voted for it or not ?

Answer. No ; I couldn't say positively.

Question. Don't you recollect what your ideas were at that time ?

Answer. I don't recollect whether I voted for it or not ; no, sir.

Question. Was there a proposition submitted to the council by the water works company for the sale of their plant ?

Answer. Not that I remember. I can't say positively as to that.

Question. Do you own any stock in the Walla Walla Water Company ?

Answer. No, sir.

Question. Do some of the members of your family own any stock in it ?

(Counsel for complainant objected to this question, on the ground that it is incompetent, irrelevant, and immaterial.)

Answer. I couldn't say positively.

Question. What do you think about it ?

Answer. The reason that I answered that question as I did is the Baker estate is interested in the water-works, but whether it is held

by the estate or by private members of the estate would affect that question. I don't know whether it is held by the estate or by the private members of the estate.

466 Question. You have an interest in that estate or your relatives have an interest?

Answer. Some of my relatives; yes, sir.

Question. What do you mean when you say that the supply for irrigation at times has been light?

Answer. Well, I mean that the pressure is not as great sometimes as others.

Question. Do you reside yourself in the locality you have mentioned?

Answer. Yes.

Question. Is your house one or two stories or one and a half?

Answer. Before I was married I lived in a two-story house, but since in a one-story.

Question. Is there water in the second story?

Answer. Yes, sir.

Question. How far is your house below the level of the reservoir of the water company?

Answer. I don't know.

Question. Do you have ample water in the second story to supply a bath-tub and water-closet?

Answer. There is a bath-tub but no water-closet. Water comes into the bath-tub.

Question. At the same time you were irrigating your lawn?

Answer. Yes.

Question. Do you know that to be a fact, at the same time you were irrigating your lawn?

Answer. Yes, sir.

Question. How many sprinklers have you?

Answer. One.

Question. Is your house as high as Mr. Dooley's?

Answer. The second floor is not; no sir.

Question. Is the elevation the same or lower—that is, the ground elevation?

Answer. The ground elevation is slightly higher, I think.

467 Question. But the house is not so high?

Answer. No, sir; not so high.

(Witness excused.)

(Signed)

H. A. REYNOLDS.

WILLIAM H. UPTON, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. State your name and occupation.

Answer. William H. Upton; lawyer by profession.

Question. Where do you reside?

Answer. In Walla Walla city.

Question. In what portion of the city?

Answer. I live on Park street, one hundred and twenty feet south of Birch.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. I am.

Question. How long have you been supplied by that company?

Answer. I have been supplied since about 1883—1882 or 1883—except during a period of two or three years, when I got water from another company. I think that was about the year 1885 or 1886; somewhere along there.

Question. Have you at present an adequate and ample supply of water for domestic and irrigation purposes, in your opinion?

Answer. I have, except if I obeyed the rule of the water company that I should not irrigate except at certain hours that would be an inconvenience. I should say my supply was insufficient if bound to obey that rule.

Question. Has that rule been enforced?

Answer. It has not. Perhaps I should explain my answer by saying that I have abundance of water whenever I desire to use it, but I have been told that they claim the right to forbid my using it for irrigation during certain hours of the day.

Cross-examination :

Question. Do you know what the elevation of the property 468 where you are is as compared with the elevation of the reservoir of the Walla Walla Water Company?

Answer. No, sir.

Question. Is your house one or two stories?

Answer. Two stories.

Question. Have you water on the second story?

Answer. I have never attempted to put it in.

(Witness excused.)

(Signed)

WM. H. UPTON.

WILLIAM JONES, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. Are you a resident of the city of Walla Walla?

Answer. Yes, sir.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. I am.

Question. What is your business?

Answer. I am in the grain and agricultural implement business.

Question. In what portion of the city do you reside?

Answer. On the corner of Rose and Palouse street, up in the northeast part of the town.

Question. In what direction from First street?

Answer. North.

Question. Have you an adequate supply of water for domestic and irrigation purposes?

Answer. I live north and east of First street, about two blocks beyond the bridge. Yes, sir.

Question. How long have you been so supplied?

Answer. I have had city water for six years, and during nearly all of that time I have not had much of any inconvenience. There was one year we had a little trouble on the upper story, but never on the lower story.

469 Question. Was that during the summer of 1891?

Answer. Yes; I think it was the summer of 1891—either 1890 or 1891. It was one—these seasons that impressed me, as we had a little trouble with bath water upstairs.

Question. Have you never had cause to complain or made complaint?

Answer. No, sir.

Cross-examination:

Question. Do you get water on the upper story?

Answer. Yes, sir; we used the sprinkler at night and the bath-room at night. That was the trouble. In 1891 we couldn't have them running at the same time.

Question. How many service pipes have you connecting with the main of the water company?

Answer. I don't know. We have two faucets for sprinkling purposes. We have a bath-room and closet upstairs.

Question. Is there more than one service pipe extending from the main?

Answer. No; I know of only one pipe running in from Rose street—at right angles from Rose street.

(Witness excused.)

(Signed)

WILLIAM JONES.

ALEXANDER M. CATION, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. What is your business?

Answer. Book-keeper.

Question. How long have you resided in Walla Walla?

Answer. About seven years.

Question. In what portion of the city do you live?

Answer. I live now on Washington street.

Question. Whereabouts on Washington street?

Answer. No. 145. It is between Park street and Howard street.

Question. What direction and what distance from the house occupied by Mr. Snell?

470 Answer. I am one block below him.

Question. Is your house on the same elevation as his?

Answer. Except that I am a little higher.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. Yes, sir.

Question. Have you been continuously?

Answer. No, sir.

Question. How long have you been supplied?

Answer. A little over a year.

Question. During that time has your supply been adequate, ample for domestic and irrigation purposes?

Answer. Yes, sir.

Cross-examination :

Question. Do you recollect the date of your commencing to take water from the company?

Answer. Yes, sir.

Question. What time was it?

Answer. A year ago last August.

Question. The latter or first of August?

Answer. I think it was about the middle of August or near that.

Question. You were not taking water from the company, then, during the year 1892 and the greater part of the summer season of 1893?

Answer. No, sir; I commenced in August of 1893.

Question. Do you have water in the second story of your residence?

Answer. I haven't any second story.

Question. Your house is only one story?

Answer. Yes, sir.

(Witness excused.)

(Signed)

A. M. CATION.

471 F. M. BOWMAN, being recalled as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. Are you generally familiar, Mr. Bowman, with the location of hydrants on the mains of the water company's plant in the city of Walla Walla?

Answer. Yes, sir.

Question. Do you remember the hydrant on the corner of Madison and Whitman street?

Answer. Yes, sir.

Question. To what main is that hydrant attached?

Answer. To the four-inch main on Madison street.

Question. Is there a larger main near the location of that hydrant?

Answer. Yes; there is a ten-inch main on Whitman street.

Question. How far away is that hydrant?

Answer. Well, in the neighborhood of forty feet, or forty-five, I presume.

Question. Did you put in the hydrant in the street at that point?

Answer. Yes, sir.

Question. By the direction of the city?

Answer. Yes, sir.

Answer. They sent word that the engine was not steaming well.

Question. Did you notice yourself the streams from that engine?

Answer. Yes; I went right where the streams were playing on the fire.

Question. Were those streams as large as they usually are?

Answer. They were the same sized streams, but they lacked force.

Question. What was the occasion of your going back to the engine?

Answer. I didn't go to the engine at all. I had ordered them to take up the hose.

Question. Why did you order them to take up the hose?

Answer. The fire was pretty well under control and I retired the engine that was not steaming, and we handled the fire with the other engine.

475 Question. Was there any other time that you had trouble with the engine or made recommendations for improvements in the fire system?

Answer. I have made such recommendations; yes.

Question. Go on and state what improvements you have suggested and what trouble you have had.

Answer. I have reported to the council that in my opinion that the Rescue engine was not in proper condition (this is the engine we use as a reserve). I reported that it was not in proper condition and recommended that the city purchase a first-class engine. The two engines we have here are fourth-class engines.

Question. What do you mean by fourth class?

Answer. They are rated as such by the builders. They are rated as first, second, third, and fourth class.

Question. Are they insured as fourth class?

Answer. Yes, sir; they are built as such—or No. four, you might call them.

Question. Have you ever had occasion to report the engines at different times?

Answer. Well, they have been under repair several times.

Question. For what reason?

Answer. Well, after the Stine House fire the old engine was taken to the shop and the pumps repaired by boring them, and the steam cylinder and lower flues were repaired or worked on.

Question. Have you ever had any trouble with the city hydrants—have they ever been out of repair?

Answer. Yes, sir.

Question. For what reasons did you repair them?

Answer. Some of them worked very hard. There is a little oil-hole that extends down the middle of the hydrants for the purpose of oiling the threads, and persons would throw bits of nails, wire, and such things down there, and it would interfere with the working of the hydrants.

476 Question. Were the hydrants ever cleaned out and the nails, etc., found inside?

Answer. Yes; it has been done frequently during the summer time. I am not positive as to the time. Men have been sent

around to tap the holes up with little brass plugs for the purpose of keeping out the wire, etc.

Question. What effect would that wire, etc., have on the efficiency of the hydrant or of the stream thrown?

Answer. It would all tend to prevent the proper use of the hydrant. It would prevent the opening of it to some extent.

Question. Would it tend to make a broken stream?

Answer. I think it would not unless it wasn't opened sufficiently.

Question. Would it be difficult to open the hydrant sufficiently?

Answer. It takes quite a number of turns, and some of them work rather hard.

Question. If not properly turned, what would be the effect?

Answer. Only a partial supply of the water supplied through the hydrant.

Question. Do you know who was in charge of the engine that didn't work properly at the City Hotel fire?

Answer. Engineer Guichard, I think it was.

Cross-examination:

Question. Your hydrants are cleaned under your direction, at intervals, are they not?

Answer. Yes, sir.

Question. Your hydrants are hydrants suitable and proper for the purpose for which they are intended?

Answer. Yes, sir; I think so.

Question. Nails don't get in them any more than in ordinary hydrants of that class?

Answer. It is a different make hydrant from most of them. I don't know as they are commonly used either, but this oil hole running down the stem is different from most hydrants in that
477 respect, I think.

Question. Do you say your engines are No. two?

Answer. No. four, I think.

Question. Now, these numbers given these engines are given them with reference to their capacity, are they not?

Answer. I think so.

Question. Your engines are good engines of their class?

Answer. One, I think, is.

Question. Isn't the other a good engine, except somewhat old?

Answer. The engine part is good, but the boiler is not, in my opinion.

Question. With the old boiler that you have on the engine, you get sufficient steam to properly work the pumps?

Answer. Sometimes, and sometimes we can't.

Question. Why can't you?

Answer. I can't account for the want of steam; all I know is, at the City Hotel fire, the engine wouldn't work. The engineer reported to me that it didn't steam good.

Question. Who was the engineer—Guichard?

Answer. Yes, sir.

Question. When there is an insufficiency of water, your engines run harder, don't they?

Answer. Yes, sir.

Redirect examination:

Question. I want to call your attention to the meeting had between you and Mayor Roberts with regard to a meeting of the volunteer fire department for the purpose of determining whether or not they should disband. State what took place at that meeting, and what was said.

Answer. Well, we have had several meetings in the last five or six years with that view—at least two or three, I think.

Question. For what reasons did you hold those meetings?

Answer. There was one meeting after the Stine House fire, for the reason that the fire department was censured by the public, and especially the papers, for, to use their words, "poor work done at the fire," and the matter was discussed pretty thoroughly, and the department felt that a part of the fault was owing to the fact that we had not proper apparatus. That was the view generally held.

Question. What was the result of that meeting?

Answer. We didn't disband, but afterwards the fire and water committee were instructed to procure other apparatus.

Question. Are you an engineer?

Answer. I have run an engine some.

Question. At these different fires that you have attended in Walla Walla, have you noticed whether any of the streams have broken window-glass?

Answer. Yes, sir.

Question. Have they at any of the fires?

Answer. Yes, sir.

Question. Of your own knowledge and information, is it necessary in order to have a sufficient stream on a fire, that such a stream should be able to break window-glass at a distance of fifteen or twenty feet on all occasions?

Answer. Well, it is owing to the direction which the stream strikes the glass, and whether the glass is hot or not. If the stream strikes the glass angling it is more difficult to break the glass than though it struck the glass at right angles.

Question. As chief engineer of the fire department, have you not paid particular attention to fires at other places where streams have been directed towards window-glass.

Answer. Yes, sir.

Question. At what other places?

Answer. Portland, San Francisco, and Tacoma.

Question. Have those streams always broken glass in those places?

Answer. No, sir; not always.

479 Question. There is no general rule about it at all, is there?

Answer. No, sir; I think not.

Recross-examination :

Question. It is necessary to get water inside a building when it has fire inside?

Answer. Not always; no, sir.

Question. As a rule it is, isn't it?

Answer. I wouldn't say one way or the other.

Question. As a rule, it is necessary to get water inside?

Answer. Yes, sir.

Question. Haven't you frequently seen doors broken down with a stream of water?

Answer. I have seen the thing done, but it is very difficult to do.

Question. You haven't seen a stream sufficient for fire purposes that wouldn't break a pane or glass at a distance of from eight to fifteen feet, have you?

Answer. No, sir.

Question. Now at these meetings that were held, was any complaint made by the department as to insufficiency of water supply?

Answer. No, sir.

Question. Did nobody say anything about that?

Answer. Not at this particular one following the Stine House fire.

Question. At any of the meetings in which the question arose?

Answer. I think there was; yes, sir.

Question. Haven't complaints as to the insufficiency of the water supply been general among the members of the fire department?

Answer. No, sir; not to my knowledge.

Question. Now, one of the engines was repaired after the Stine House fire, was it not?

Answer. Yes, sir.

(Witness excused.)

(Signed)

Y. C. BLALOCK.

480 J. CHITWOOD, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. State your name and residence.

Answer. Joel Chitwood; I reside in Walla Walla.

Question. How long have you resided here?

Answer. About fourteen years.

Question. What is your occupation?

Answer. I am cashier of the Farmers' savings bank at present.

Question. In what part of the town do you reside?

Answer. I reside in Roberts' addition.

Question. In what direction from First street?

Answer. From First street?

Question. Yes.

Answer. I live almost at the end of First street; probably a block of the south end of First street, to the east of it.

Question. Are you above or below First street?

Answer. Above it.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. Yes, sir.

Question. How long have they furnished you with water?

Answer. Well, six or seven years.

Question. Have you an adequate and ample supply of water for domestic and irrigation purposes?

Answer. All that I care for, yes.

Question. Have you always had a sufficient supply?

Answer. As much as I wanted; yes, sir.

Question. For both domestic and irrigation purposes?

Answer. Yes, sir.

Question. Do flowers and grass grow on your place without any trouble?

Answer. Yes, sir; with proper cultivation.

Question. Have you nice lawns in the neighborhood?

Answer. Yes, sir; I think so. I have a nice lawn.

481 Question. Have any of your neighbors nice lawns?

Answer. Yes, sir; the neighbor across the fence from me has a nice lawn.

Question. Trees and flowers also?

Answer. Yes, sir.

Question. Are they also supplied with water from the Walla Walla Water Company?

Answer. I think so.

Cross-examination:

Question. Mr. Chitwood, is your house one or two stories?

Answer. Two stories.

Question. Do you get water on the upper story?

Answer. I have no pipes to the upper story at all.

Question. How long have you lived where you now live?

Answer. About seven years, I think.

Question. During that seven years has there never been a shortage of the water supply at your house?

Answer. Not at my place.

Question. Has there generally—in your vicinity?

Answer. I couldn't say.

Question. Do you get water in your house at all times when irrigating?

Answer. Yes, sir; I can do so.

Question. How many service pipes have you connecting with the main?

Answer. One.

Question. You are cashier of the Farmers' savings bank?

Answer. Yes, sir.

Question. Some of the stockholders of that bank are interested in the water company, are they not?

Answer. I don't know. I have not access to the water company's stock books.

(Witness excused.)

(Signed)

J. CHITWOOD.

482 P. B. JOHNSON, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. You reside in Walla Walla ?

Answer. Yes, sir.

Question. How long have you resided here ?

Answer. Thirty years and over.

Question. What is your occupation ?

Answer. I am a lawyer.

Question. In what part of the city do you reside ?

Answer. I live on the corner of Catherine and Dr. Newell street, in the northeastern part of the city.

Question. Does the complainant in this case furnish you with water ?

Answer. Yes, sir.

Question. How long has the water company furnished you with water ?

Answer. Seven or eight years or longer.

Question. During that time have you had an ample supply of water ?

Answer. Plenty of it.

Question. Have you ever made any complaint to anybody about supply ?

Answer. Never about the supply.

Question. You have a nice place ?

Answer. People say so.

Question. Modesty forbids you to speak, I suppose ?

Answer. Yes, sir.

Cross-examination :

Question. Have you got water on the second story of your building ?

Answer. No, sir.

Question. Have you never attempted to take it up there ?

Answer. No, sir. I have thrown it up there from the hydrant through a hose or a little garden pipe, upon the roof.

483 Question. Have you ever received any compensation from the water company as a lawyer or newspaper man for advocating their cause ?

Answer. For advocating their cause, yes, sir. No, sir ; I will take that back. I never received anything from the water company.

Question. Or any person connected with the water company ?

Answer. Yes, sir.

(Witness excused.)

HERBERT JONES, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. In what part of the city do you reside, Mr. Jones ?

Answer. On East Alder street.

Question. About how far above First street ?

Answer. Oh, it is two or three blocks east.

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with water ?

Answer. Yes, sir.

Question. How long has the water company furnished you with water ?

Answer. Seven or eight years or longer.

Question. During that time have you had an ample supply of water ?

Answer. Plenty of it.

Question. Have you ever made any complaint to anybody *to anybody* about supply ?

Answer. Never about supply.

Question. You have a nice place ?

Answer. People say so.

Question. Modesty forbids you to speak, I suppose ?

Answer. Yes, sir.

Cross-examination :

— Have you got water on the second story of your building ?

484 Answer. No, sir.

Question. Have you never attempted to take it up there ?

Answer. No, sir. I have thrown it up there from the hydrant through a hose or a little garden pipe, upon the roof.

Question. Have you ever received any compensation from the water company as a lawyer or newspaper man for advocating their cause ?

Answer. For advocating their cause, yes, sir. No, sir ; I will take that back. I never received anything from the water company.

Question. You are not at present connected with the water company ?

Answer. No, sir.

(Witness excused.)

(Signed)

P. B. JOHNSON.

HERBERT JONES, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. In what part of the city do you reside, Mr. Jones ?

Answer. On East Alder street.

Question. About how far above First street ?

Answer. O, it is two or three blocks east.

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Question. Above First street?

Answer. Above First street, yes.

Question. About what distance, I say?

Answer. Oh, it must be nearly a quarter of a mile, or somewhere in that neighborhood.

Question. What is your business?

Answer. I run the business of the Pacific Coast Elevator Company—grain business.

Question. Are you supplied with water by the Walla Walla Water Company?

Answer. Yes, sir.

Question. How long have you been so supplied?

Answer. Nearly three years.

485 Question. During that time have you had an ample supply of water?

Answer. Yes, sir.

Cross-examination :

Question. Do you irrigate your grounds?

Answer. Yes, sir.

Question. Have you water on your second story?

Answer. No, sir; I have never put it in.

Question. Do you never have any difficulty in getting water for your house when irrigating?

Answer. No, sir.

Question. How far above the level of the reservoir?

Answer. They said it was about sixteen feet.

Question. Did they say there was sixteen feet of head at your place?

Answer. Yes, sir.

(Witness excused.)

(Signed)

HERBERT H. JONES.

Dr. HOWARD R. KEYLOR, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. Where do you reside, Doctor?

Answer. On the corner of Birch and Palouse street.

Question. How large a place have you?

Answer. It is two hundred feet deep and two hundred and ten feet front.

Question. Is it covered with a lawn, or most of it?

Answer. Yes; all of it.

Question. Who supplies you with water?

Answer. The Walla Walla City Water Company.

Question. How long have they furnished you with water?

Answer. Five years.

Question. During that time have you always kept your place in good order?

Answer. Yes, sir.

486 Question. Have you had plenty of water for domestic and irrigation purposes during that time?

Answer. Yes, sir.

Question. Have you made any complaint to anybody or had any cause to complain about the insufficiency of water supply?

Answer. No, sir.

Cross-examination:

Question. Do you own any stock in the Walla Walla Water Company?

Answer. No, sir.

Question. Do any of your relatives own any stock in it?

Answer. I believe my father-in-law does.

(Witness excused.)

(Signed)

HOWARD R. KEYLOR.

G. W. BABCOCK, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. What is your business?

Answer. Architect.

Question. You have your office in the Rees-Winans building?

Answer. Yes, sir.

Question. Where is that building located?

Answer. On the corner of Second and Main.

Question. On what story is your office?

Answer. Third story.

Question. During what years have you occupied it?

Answer. I have occupied it ever since the building was built, up to a week ago.

Question. Have you always had an abundant water supply in that building?

Answer. Yes, sir; plenty of it.

Question. You have no trouble in getting water up there at that place at any time?

Answer. No.

487 Question. During all of the time that you have had your office in that building have you had plenty of water?

Answer. Yes; plenty of water in my office.

Cross-examination:

Question. Has not there been a time in that building when there was no water on the highest stories?

Answer. Not to my knowledge; I don't think there has.

Question. Do you know whether there has or not?

— I do not.

(Witness excused.)

(Signed)

G. W. BABCOCK.

J. A. TAYLOR, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. In what part of the city do you reside, Mr. Taylor?

Answer. On the corner of Sixth and Rose.

Question. How long have you lived there?

Answer. O, most of the time for eighteen years.

Question. Where do you live with reference to Mr. Talabera?

Answer. Well, I live right opposite, across the street from him, half a block below, down Rose street.

Question. What is the difference in elevation from your place to his?

Answer. Not very much; water runs from his place to mine.

Question. You have an ample and adequate and ample supply of water?

Answer. Yes, sir.

Question. How many houses have you?

Answer. I have eight houses there.

Question. Do you use water for irrigation and domestic purposes?

Answer. I don't do much irrigation; my yard is small.

Question. You have flowers and grass?

Answer. Yes.

488 Question. Are you well supplied with water?

Answer. I have plenty of water. It is a two-story house, with bath-room and closet.

Question. Do you irrigate with the sprinkler?

Answer. Yes; but my yard is small.

Question. Are the pipe connections all good in that neighborhood?

Answer. As far as I know; yes, sir.

Question. Are there not several houses connected with one pipe?

Answer. I was going to explain that so you would understand it. When I first went there, there was no main from the Main Street main on Sixth street to my house. I was pretty near the farthest corner of the block. Isaacs owned the water works then. He made me pay — dollars for a tap from the main to my house, and I paid forty dollars for a tap to my house. In that way I got a tap from the four-inch main.

Question. Since then you have been supplied with water?

Answer. Yes, sir.

Question. Do you receive your water or any portion of it from the water company without authority?

Answer. Do I?

Question. Yes.

Answer. No, sir; not for house purposes.

Question. Do you for irrigation?

Answer. No, sir.

Question. For any purpose?

Answer. Well, I don't think I do. I use the water for sprinkling the streets that I get from the city, but, as I told you before, for my own convenience they allowed me to tap the main in any place.

Question. Are your eight houses all two-story buildings?

Answer. No, sir; one is two stories, but it has no water upstairs; and then the one I live in, it has water upstairs.

Question. At all times during the last five or six years
489 have you had water upstairs?

Answer. My house has only been built about three years. I have, ever since it was built.

Question. Has there never been any insufficiency of your supply of water?

Answer. Not a bit.

(Witness excused.)

(Signed)

JOHN A. TAYLOR.

JOHN McFEELY, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. Do you remember the Alder Street fire?

Answer. Yes, sir.

Question. How long ago did it occur?

Answer. It occurred last month.

Question. Was this fire near your place?

Answer. Yes, sir.

Question. What is your business?

Answer. Horseshoeing.

Question. Where is your shop?

Answer. On the corner of Third and Alder street.

Question. How far from the Alder Street fire?

Answer. Well, the one closest to my house was about five feet.

Question. Was that house burning?

Answer. Was it burning?

Question. Yes.

Answer. Yes, sir.

Question. Were you there during all the fire?

Answer. Yes, sir.

Question. Did the fire have pretty good headway at any time?

Answer. It had pretty good headway at the first house.

Question. Did you take any steps to remove your goods from the building?

Answer. No, sir.

490 Question. For what reason?

Answer. Because I thought it was safe.

Question. Did you notice the streams of water on the fire?

Answer. Yes, sir.

Question. How many streams did you see?

Answer. There were four.

Question. Did the streams have pretty good force, or what was your opinion at that time?

Answer. The four streams didn't seem to have very good force when they put the four on.

Question. But you thought it was sufficient water to keep your building from catching?

Answer. Yes, sir; my shop is small, and I thought having four streams it couldn't burn my shop.

Question. How long did the fire last?

Answer. I couldn't tell you how long. It must have been several hours anyway. It was a good while.

Cross-examination :

Question. The fire hadn't ignited the building next to yours?

Answer. No, sir; it was the third house.

Question. Yours was the third house in the range from where it was?

Answer. Yes, sir.

Redirect examination :

Question. These two buildings were on fire next to the shop?

Answer. Yes, sir.

Question. At any time did you think there was any danger of being burned out?

Answer. No, sir.

Recross-examination :

Question. Was it raining at the time?

Answer. Why, it wasn't raining much. It was raining some.

Redirect examination :

Question. Did you consider the fact that it was raining as a reason for not fearing being burned out?

491 Answer. No, sir; I didn't think that had much to do with it. It was sprinkling a little.

(Witness excused.)

(Signed)

JOHN McFEELY.

F. W. MARTIN, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. Did you see the Alder Street fire?

Answer. I did; yes.

Question. Were you there during all the fire?

Answer. Not all of it; probably over half of it.

Question. Where did you stand?

Answer. All around, at no particular place; on this side and the other side, by the brewery.

Question. Did you notice the streams of water on the fire?

Answer. Yes, sir.

Question. Did they have good force?

Answer. Tolerably good; yes, sir.

Question. Did any streams go over the building?

Answer. I think they did.

Question. Were you wet by any of the streams that were playing from the other side?

Answer. I don't think I did; I wasn't close enough. I know I didn't get wet. I wasn't close enough.

Cross-examination :

Question. You were simply watching the fire as a spectator?

Answer. Yes.

Question. You were not paying particular attention to whether the water went over the buildings or not?

Answer. Not very much.

Question. You are not connected with the fire department?

Answer. No, sir.

(Witness excused.)

(Signed)

F. W. MARTIN.

492 JOHN GREEN, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. What is your business, Mr. Green?

Answer. Lawyer by profession.

Question. Were you at the Alder Street fire?

Answer. A very short time.

Question. Did you notice the streams?

Answer. Yes, sir.

Question. Were they sufficient streams for a fire?

Answer. It seemed so to me. There were two streams in front, and they seemed to me to be sufficient. That was my opinion.

Question. Did any of the water come over the building from the streams playing from the other side?

Answer. Yes, sir; I noticed once or twice it went over the building, or rather between the building and the shop; it was evidently as high as the building. The water seemed to go over the rear of the building.

Question. At the time did you make any remarks as to the sufficiency of the water supply?

Answer. Yes, sir; I was in company with a gentleman and remarked to him about the two streams in front saving all but the two buildings that were on fire.

Cross-examination :

Question. Were you there at the time the fire commenced?

Answer. No, sir; shortly after.

Question. At the time you got there was only one building on fire?

Answer. I think possibly the second building had caught. I don't know whether there was one or two.

Question. They were unable to save the second building?

Answer. It seems so.

Question. Did they throw what water they had on it?

Answer. I suppose they did, sir; I don't know about that.

Question. Now what was the size of this building that first caught?

493 Answer. Well, it was rather a small building, but I think it was a two-story building.

Question. Well, about what were its dimensions on the ground?

Answer. It is all guesswork, but I suppose that building must have been twenty-five feet front by forty feet back.

Question. Was it a frame structure?

Answer. I think so.

Question. When you got there, did the fire department have four streams on that building?

Answer. No, sir; I don't think so, when I first reached there. There were four streams shortly after.

Question. Would you consider four streams sufficient that couldn't confine the fire to that one building?

Answer. I am speaking now particularly about the two front streams. I know very little about the streams playing on the rear part of the building. It seems to me the two streams were sufficient.

Question. Where was the engine sitting that threw the rear streams?

Answer. I couldn't tell you; one was at the brewery and one at the post-office.

Question. You couldn't tell which threw the front and which the rear streams?

Answer. No, sir; I paid no attention to them.

Redirect examination :

Question. You don't know when the fire was discovered?

Answer. No, sir; I do not.

Question. Was the building empty?

Answer. I was told so; that is all I know about it.

Question. Is there part of the building standing yet?

Answer. Yes; I think most of the frame is standing of the second building fired.

(Witness excused.)

(Signed)

JOHN GREEN.

494 MOSES O'BRIEN, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. Were you present at the Alder Street fire, Mr. O'Brien?

Answer. Yes, sir; I was.

Question. Did you notice four streams on the fire?

Answer. Yes, sir.

Question. How long were you present?

Answer. During most of the fire.

Question. Did those streams seem to you to be of good force and size?

Answer. They seemed to be all the hose could hold conveniently.

Question. Did you notice any of the water from the streams on the other side of the building from where you were standing go over the building?

Answer. I noticed one stream come over the building, or partly over the building. I could see the stream that was playing over the top of the blacksmith shop.

Question. As they were playing over the top of the building, did they once in a while come over?

Answer. I was standing across the street, right opposite the fire, and I could see water above the building. I couldn't say positively that it came over the building.

Question. Above the two-story building?

Answer. Yes, sir.

Cross-examination :

Question. How far were you standing from the fire?

Answer. A little further than across the street. I was standing on the corner, and this building was on the opposite side of the street, up from the corner of the lot a little ways.

Question. Were there one or two streams being played over the top of the blacksmith shop?

Answer. There was only one I saw from the rear. I don't know where it was located.

495 Question. You couldn't determine what the force of the stream, from the rear, was?

Answer. All I could determine is, I could see it above the fire. I don't know how high the pipe was; I couldn't see it.

Question. You were simply there as a spectator and didn't have hold of the nozzle at all?

Answer. No, sir.

Question. You couldn't really tell what the force of the stream was?

Answer. No, sir.

(Witness excused.)

(Signed)

MOSES P. O'BRIEN.

JAMES McAULIFF, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. Are you a resident of Walla Walla city, Mr. McAuliff?

Answer. Yes, sir.

Question. What is your business?

Answer. The drug business.

Question. Were you mayor of the city twelve years?

Answer. Eleven, sir.

Question. Were you present at the Alder Street fire?

Answer. No, sir; I was not.

Question. Didn't you see it at all?

Answer. No, sir.

Question. Where do you reside?

Answer. I reside on the corner of Rose and Colville, across the Main Street bridge.

Question. In what direction from Mr. Quinn's house?

Answer. Right across the street. He lives on the corner of Colville and Rose, the northwest corner, and I live on the southwest corner of Colville and Rose.

Question. How long have you lived in that house?

Answer. Thirty years.

496 Question. Do you get your water supply from the Walla Walla Water Company?

Answer. Yes, sir.

Question. How long have you been supplied by them?

Answer. Ever since there has been a company; I don't recollect how long.

Question. Have you been so supplied during the last two or three years?

Answer. Yes, sir.

Question. During that time has your supply been ample and sufficient for domestic and irrigation purposes?

Answer. Yes, sir.

Question. Is your lawn kept in a good condition?

Answer. Yes, sir.

Question. And Mr. Quinn's also?

Answer. Mr. Quinn's looks very well; yes.

Question. Are there flowers and trees on both places?

Answer. Yes; he has a frontage of one hundred and thirty-five by two hundred feet deep, I think. His is much larger than mine.

Cross-examination:

Question. Have you never at any time had any deficiency in your water supply?

Answer. No, sir; there has always been enough when I turned it on.

Question. Have you always had sufficient force?

Answer. Sometimes it is stronger than others for a little while; I laid that to people using it above me.

Question. Sometimes, when other persons were irrigating above you, the force was a little light?

Answer. Yes, sir; a very little light.

Question. Have you water in the second story of your house?

Answer. It is a story and a half; no, sir.

Question. You say you were mayor eleven years?

497 Answer. Yes, sir.

Question. You were a candidate for mayor against Mr. Roberts when the water proposition was at issue, were you not?

Answer. Yes, sir.

(Witness excused.)

(Signed)

JAMES MCAULIFF.

JOHN H. PEDIGO, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows :

Question. Were you present at the Alder Street fire ?

Answer. Yes, sir ; part of it.

Question. Where were you standing ?

Answer. Well, we first went to the back of the building and then went around to the front.

Question. Did you notice four streams on the fire ?

Answer. Yes. I couldn't see but three of them at once, but I thought there were four.

Question. Did they seem to have sufficient force ?

Answer. Well, I don't know anything about the force.

Question. Were they good-sized streams ?

Answer. Yes, sir ; I thought so.

Question. Did any of them raise higher than the two-story building that was on fire ?

Answer. I think they did, sir.

Question. Did you notice any water come over the building from the back to the front ?

Answer. Well, some fell in front. I supposed it came from the back of the building.

Question. Did you notice whether it came from one of the streams at the back of the building ?

Answer. I couldn't see the hose at the back of the building, but I saw no other way for it to get in front.

Cross-examination :

Question. Do you reside in Walla Walla ?

Answer. Yes, sir.

498 Question. How long have you lived there ?

Answer. Nearly a month.

Question. How far were you standing from the fire ?

Answer. Well, sir, I was just beside the sidewalk, out in front.

Question. What business are you engaged in ?

Answer. I am a law student.

Question. In your judgment, were the streams sufficient and adequate fire streams ?

Answer. Yes ; I thought they were good streams.

Question. Compared with what ?

Answer. With nothing.

Question. Did you ever see a fire stream anywhere else ?

Answer. Yes, sir ; at Roanoke, Virginia.

Question. Were these streams as large as the streams at Roanoke, Virginia ?

Answer. No, sir.

Question. At what other places have you seen fire streams ?

Answer. At no other place. I never saw any other.

(Witness excused.)

(Signed)

JOHN H. PEDIGO.

PHILLIP M. WINANS, being first duly sworn as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. What is your business, Mr. Winans?

Answer. At present city editor of the Walla Walla Union.

Question. Were you at the Alder Street fire?

Answer. Yes, sir.

Question. How long?

Answer. About three hours.

Question. Did you notice four streams of water on the fire?

Answer. I did.

Question. What force were they?

Answer. About fair, average force.

Question. Did you notice any water rise over the building
499 from the stream on the opposite side when you were standing
in front?

Answer. Yes, sir.

Question. Did you notice the streams rise higher than the building?

Answer. Yes, sir.

Question. You are speaking now of the two-story building?

Answer. Yes, sir.

Question. Were you wet by any water that came from the other side of the building from where you were standing?

Answer. I was wet. I was standing about the center of the street with William Kirkman when it struck me.

Question. You are sure the stream came from the other side of the building?

Answer. Yes.

Question. How do you know?

Answer. It struck me from the spot where the hosemen were moving around with the hose.

Question. Do you know whether there was any stream on the other side of the building?

Answer. Yes, sir; whenever the hose was elevated the stream went over the building.

Question. Where was the hose that was elevated?

Answer. Towards the rear of the building.

Question. Were these streams fair streams?

Answer. They were fair for the Walla Walla fire department.

Question. They were good, average streams for the Walla Walla fire department, were they?

Answer. With the present apparatus.

Question. Have you seen any other fire streams?

Answer. I have.

Question. At other places than Walla Walla?

Answer. Yes, sir.

Question. Where?

Answer. At Kansas City, Missouri.

500 Question. Is that better than the Walla Walla department?

Answer. I think so.

Question. Doesn't the Walla Walla department average as good?

Answer. No, sir.

Question. Have you seen any other place that operated the same character of fire stream as Walla Walla operates?

Answer. Yes, sir.

Question. What place?

Answer. Kansas City.

Question. Is that department operated better?

Answer. Yes, sir.

Question. Have they better force?

Answer. Yes, sir.

Question. Do you know what causes the difference?

Answer. I don't know.

(Witness excused.)

(Signed)

P. M. WINANS.

Plaintiff here rests *his* case.

(COUNSEL FOR DEFENDANT: I wish to ask Mr. Betz one question.)

COUNSEL FOR COMPLAINANT: I will object to Mr. Betz being recalled on the ground that, defendant- having closed their case, further rebuttal testimony is not proper.

JACOB BETZ, being recalled as a witness on the part of plaintiff's rebuttal, testified as follows:

Question. Mr. Betz, you heard the testimony of Mr. Bowman that you directed him to place the hydrant on the corner of Mason and Whitman streets on the four-inch main?

Answer. I did, sir.

Question. Were you there when the hydrant was put in?

Answer. When the ground was broke. The nine or ten inch main was dug up when I was there.

501 Question. You were there when the excavation was made, were you?

Answer. Yes, sir.

Question. What main did that excavation expose?

Answer. It was a ten or nine inch main on Whitman street.

Cross-examination:

Question. He was doing this work for the city?

Answer. Yes, sir.

(Witness excused.)

Defendant- rests *his* case.

502 In the Circuit Court of the United States of America, District of Washington, Southern Division, Ninth Circuit.

THE WALLA WALLA WATER COMPANY, a Corporation, Com-
plainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City; Robert Parks, Treasurer of said City, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of the City Council of said City, Defendants.

This cause come on to be heard at this term and was argued by counsel; and thereupon, on consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

First. That the contract between the plaintiff and the city of Walla Walla, set out in full in the bill of complaint, wherein the said city of Walla Walla contracted and agreed with the plaintiff,

among other things, to not erect, maintain, or become interested in any water works in the city of Walla Walla except those of the plaintiff for the period of twenty-five years, save and except after the judgment of a court of competent jurisdiction avoiding said contract on the ground that there had been a substantial failure on the part of plaintiff to keep, maintain, and furnish to the city of Walla Walla and its inhabitants an ample supply of good, wholesome water at reasonable rates or a substantial failure on the part of plaintiff to keep and perform the covenants and agreements on its part in the said contract specified, but the said defendant in and by said contract reserving to itself the right to take, consume, and pay for the water rights and works of the plaintiff at any time, and the plaintiff and said defendant in said contract agreeing that in such contingency the right of the plaintiff under said contract should not be taken into consideration in estimating the value of the water works of the plaintiff corporation, constitutes a valid and binding contract on the part of the plaintiff and the said defendant, The City of Walla Walla; that the said plaintiff has at all times substantially complied with all the terms and conditions on its part in said contract agreed to be kept and performed, and that said contract has never been avoided by the city of Walla Walla, nor has any court of competent jurisdiction ever avoided the same or decided or decreed that there had been a substantial or other failure on the part of the plaintiff to keep, maintain, and furnish to the city of Walla Walla and its inhabitants an ample supply of good, wholesome water at reasonable rates or a substantial failure on the part of plaintiff to keep and perform the covenants and agreements on its part in the said contract specified;

504 that the said defendant, The City of Walla Walla, and the other defendants, the officers of the said city of Walla Walla, are threatening to and about to violate the said contract by erecting, building, and operating water works belonging to the city

of Walla Walla in opposition to those of the plaintiff and by engaging as a competitor with plaintiff in supplying the city and its inhabitants with water, and that said action will result in impairing the obligation of said contract and constitutes a wrong remediable in this court by injunction.

Second. That the defendants, The City of Walla Walla, John C. Roberts, mayor of said city; Henry Kelling, clerk of said city; Robert G. Parker, treasurer of said city, and Daniel Stewart, John G. Muntinga, D. B. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, members of the city council of said city, and their successors be, and they hereby are, perpetually enjoined from proceeding further to erect water works in and for the city of Walla Walla, as in and by the ordinance of said city set out in the bill of complaint is proposed, and from acquiring any property for the purpose of carrying out the scheme of water works in said ordinance proposed or from further expending the moneys of said city of Walla Walla in furthering and promoting said scheme of water works or from negotiating or selling the bonds or other securities of the city of Walla Walla for the purpose of erecting, maintaining, or operating water works and from further denying the obligations of the said city of Walla Walla under its said contract with the plaintiff corporation to obtain its water supply from the said plain-

505 tiff at the price fixed in and by said contract and from denying its obligations under said contract to refrain from building, maintaining, or becoming interested in any system of water works other than that belonging to the plaintiff.

Third. That the defendant The City of Walla Walla pay to the plaintiff its costs of this cause, such costs to be taxed by — —, the clerk of this court, according to the rules and practice of this court, and that after the costs are so taxed the plaintiff have execution therefor.

Done in open court, at Walla Walla, Washington, this 8th day of May, 1895.

(Signed)

C. H. HANFORD, *Judge*.

506 (Endorsed on back as follows:) No. 103. In the superior court of Spokane county, Washington. W. W. Water Co., plaintiff, vs. The City of Walla Walla, defendant. Decree. Filed in the office of U. S. circuit court this 8th day of May, 1895. (Signed) A. Reeves Ayres, clerk, (signed) by W. H. Kirkman, deputy. Turner, Graves & McKinstry, attorneys for — —.

507 In the Circuit Court of the United States of America, District of Washington, Southern Division, Ninth Circuit.

THE WALLA WALLA WATER COMPANY, a Corporation, Com-
plainant,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City; Robert Parks, Treasurer of said City, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of the City Council of said City, Defendants.

Come now the defendants and hereby except and take the following exceptions to the decree made and entered by the court in the above-entitled cause, as follows:

I.

Said defendants except to the finding and decree of the court that by "the contract between the plaintiff and the city of Walla Walla, set out in the bill of complaint, the said city of Walla Walla contracted and agreed with the plaintiff to not erect, maintain, or become interested in any water works in the city of Walla Walla, except those of the plaintiff, for the period of twenty-five years, save and except after the judgment of a court of competent jurisdiction avoiding said contract on the ground that there had been a substantial failure on the part of the plaintiff to keep, maintain, and furnish to the city of Walla Walla and its inhabitants an ample

supply of good, wholesome water at reasonable rates, or a
508 substantial failure on the part of plaintiff to keep and perform the covenants and agreements on its part in said contract specified," and to the whole of said finding.

II.

Defendants further except to the finding of the court in said decree that "the said defendant, The City of Walla Walla, in and by said contract reserved to itself the right to take, consume, and pay for the water rights and works of the plaintiff at any time," and also to the finding that "the plaintiff and said defendant, City of Walla Walla, in said contract agreed that in such contingency the right of the plaintiff under said contract should not be taken into consideration in estimating the value of the water works of the plaintiff corporation."

III.

Said defendants further except to the finding of the court that "the aforesaid contract constitutes a valid and binding contract on the part of the plaintiff and the defendant City of Walla Walla."

IV.

Said defendants further except to the finding of the court that "said plaintiff has at all times substantially complied with the

terms and conditions on its part in said contract agreed to be kept and performed."

V.

Said defendants further except to the finding of the court that "said contract has never been avoided by the city of Walla Walla; that no court of competent jurisdiction ever avoided the same or decided or decreed that there had been a substantial or other failure on the part of the plaintiff to keep, maintain, and furnish to the city of Walla Walla and its inhabitants an ample supply of good, wholesome water at reasonable rates."

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VI.

Also to the finding that there had been no substantial failure on the part of the plaintiff to keep and perform the covenants and agreements on its part in said contract specified.

VII.

Said defendants further except to the finding of the court that "the defendant The City of Walla Walla and the other defendants, as officers of the city of Walla Walla, are threatening to and are about to violate the said alleged contract by erecting, building, and operating water works belonging to the city of Walla Walla in opposition to those of the plaintiff and by engaging as a competitor with plaintiff in supplying the city and its inhabitants with water, and that said action will result in impairing the obligation of said contract, and constitutes a wrong remediable in this court by injunction."

The foregoing exceptions are all taken on the ground that the said findings are against the evidence introduced in the cause, the pleadings, and the law governing said cause.

VIII.

Said defendants further except to the second paragraph of said decree, whereby said defendants are enjoined from proceeding further to erect water works in and for the city of Walla Walla, and from acquiring property for the purpose of carrying out the scheme of water works proposed in an ordinance of said city of Walla Walla, and from further expending the moneys of the city of Walla Walla in furthering and promoting said scheme of water works, or from negotiating or selling the bonds of the city of Walla Walla for the purpose of erecting, maintaining, or operating water
510 works, and from denying the obligations of said alleged contract.

IX.

Said defendants except to the third paragraph of said decree, adjudging that the defendant The City of Walla Walla shall pay the costs of this proceeding.

W. T. DOVELL AND
STRATTON, LEWIS & GILMAN,
Solicitors for Defendants.

The foregoing exceptions to the decree are hereby allowed.

— — —, Judge.

511 (Endorsed on back as follows:) No. 103. In the circuit court of the United States for the district of Washington, southern division. Walla Walla Water Co. *vs.* City of Walla Walla *et al.* Exceptions to decree. Filed May 18th, 1895. A. Reeves Ayres, clerk, by W. H. Kirkman. Stratton, Lewis & Gilman, solicitors for defendant-, 101-106 Occidental block, Seattle.

511a In the Circuit Court of the United States for the District of Washington, Ninth Circuit, Southern Division.

WALLA WALLA WATER COMPANY }
 vs.
 THE CITY OF WALLA WALLA *et al.* }

George Turner, for complainant; W. T. Dovell and L. C. Gilman, for defendants.

HANFORD, *District Judge* :

The City of Walla Walla is a municipal corporation of the State of Washington, having a charter granted to it by a special act of the legislature of the Territory of Washington in the year 1883 (*Laws Wash. T.*, 1883, p. 270). The powers conferred upon the city by said charter include the following:

"SEC. 4. The city of Walla Walla shall have power * * * to provide fire-engines and other apparatus and a sufficient supply of water, and to levy and collect special taxes for these purposes, not to exceed in any year three-tenths of one per centum upon the taxable property within the city."

"SEC. 10. The city of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light, or water to any persons or association of persons for a term not exceeding twenty-five years: * * * Provided, always, that none of the rights or privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others.

"SEC. 11. The city of Walla Walla shall have power to erect and maintain water works within or without the city limits or to authorize the erection of the same for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, * * * and to enact all ordinances and regulations necessary to carry the power herein conferred into effect, but no water works shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city, or pay a property tax therein, on not less than five hundred dollars' worth, of property, shall at a general or special election vote for the same.

"SEC. 12. Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be neces-

sary for the construction and operation of such water works and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof."

"SEC. 103. The rights, powers and duties and liabilities of the city of Walla Walla and of its several officers shall be those prescribed in this act and none others, and this is hereby declared a public act."

"SEC. 105. The limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars."

5116 The bill of complaint alleges that in the year 1887 the city, pursuant to an ordinance authorizing the same, entered into a contract with the complainant, whereby the complainant was authorized to lay pipes for conducting water in the streets of the city and to supply the inhabitants with water, and the complainant undertook to supply water for the use of the city in extinguishing fires, flushing sewers, and all other municipal purposes for a period of 25 years. The contract also contains the following provisions:

"The city of Walla Walla shall have the right to erect in a proper and workmanlike manner, and maintain at its own expense, in such manner as to prevent leakage, as many fire-hydrants on the mains of the water company as it shall see fit, not exceeding one (1) at each street intersection; and, in case of fire, the city, through its officers and employes, shall have all reasonable and necessary control of the water company's water, mains and reservoirs for the extinguishment thereof, and, for the purpose of drilling fire companies, may use such water as may be necessary therefor, not oftener than once in two (2) weeks for each fire company; and the city may also use such water as may be necessary and convenient in and about its engine-houses and other city buildings, and to supply any and all city fire-cisterns. The city of Walla Walla agrees to pay to said Walla Walla Water Company for the matters and things above enumerated, quarter-yearly, on the 1st days of July, October, January, and April of each year, at the rate of fifteen hundred dollars (\$1,500) per annum, for the period of twenty-five (25) years, from and after the date and *apssage* of ordinance number 270, the first quarterly payment to be made on the 1st day of October next (October 1, 1887).

"The city of Walla Walla will during said period, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, and not oftener than once in each week. For all the purposes above enumerated, said Walla Walla Water Company will furnish an ample supply of water for domestic purposes, including sprinkling lawns, and an ample supply of good wholesome water at reasonable rates, to consumers, at all times during the said period of twenty-five years; and this contract is voidable by the city of Walla Walla so far as it requires the payment of money upon the

judgment of a court of competent jurisdiction whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the water company to keep or perform any agreement or contract on its part herein specified, or in this contract herein contained; but accident or reasonable delay shall not be deemed such failure, and, until this contract has been so avoided, the city of Walla Walla will not erect, maintain, or become interested in any water works except the one herein referred to, save as hereinafter specified. Neither the existence of this contract, nor the passage of ordinance number 270, shall be construed to be, or be, a waiver of or relinquishment of any rights of the city to take, condemn, and pay for the water rights and works of said company or any company at any time; and, in case of such condemnation, the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company."

In June, 1893, an ordinance was passed providing for the creation of water works and the laying of pipes by the city for supplying the city and inhabitants thereof with water and for issuing bonds to the amount of \$160,000 to provide the necessary funds for such purpose, and pursuant to the provisions of said ordinance an election was held whereby the propositions embraced in said ordinance were approved by a sufficient majority of the legal voters. Without providing for the purchase or condemnation of the works established by the complainant, the city is now proposing to sell the bonds so authorized and to become a competitor of the complainant in the business of supplying the inhabitants of the city with water, although the complainant on its part has fully complied with all the requirements of said contract. At the time of entering into said contract it was impossible for the city to have procured sufficient funds for the construction of water works sufficient to afford an adequate supply of water either by taxation or by incurring debts without exceeding the limitations fixed by its charter, and no individual or private corporation could have been found willing to invest the large amount necessary for constructing said works without obtaining concessions such as this contract contains. It will be impossible for the complainant to successfully compete against water works created and maintained at public expense; therefore the present scheme of the city if carried out will be destructive of the complainant's property and equivalent to confiscation thereof. The complainant contends that proceedings having such effect, if authorized by the laws of the State, violate the clause of the Constitution of the United States prohibiting laws which impair the obligations of contracts, and on that ground invokes the jurisdiction of a national court for its protection. In their argument upon this hearing counsel for the defendants have admitted that if the contract set forth in the bill of complaint is not unlawful the case is within the jurisdiction of this court, 511d and the complainant is entitled to the relief prayed for on the ground above specified.

Their contention is that said contract is void for the following

reasons: First, the power to construct and maintain water works conferred upon the city by its charter is a part of its legislative and governmental functions which cannot be abrogated by any act or contract of the city; second, the contract to pay for supplying the city with water for municipal purposes is quarterly installments, at the rate of \$1,500 per annum, for 25 years created a debt which, together with other existing indebtedness, amounted to a sum exceeding \$50,000, contrary to the 105th section of the charter. The arguments on both sides are well supported by authorities, but it is not practicable for me at this time to attempt a review or analysis of them. I think they can all be harmonized with the conclusion which I have reached. To establish and operate works for gathering and storing a sufficient supply of water, to protect the same from pollution, and to distribute the same to all parts of the city requires a large expenditure of capital and labor, and such expenditures are expected to yield remunerative profits to investors. It is also necessary for the purposes mentioned to exercise the power of eminent domain and the police power of the State; therefore such works combine the character of a governmental agency and of a private business enterprise. In the case of the city of Walla Walla the legislature invested the corporation with ample power to exercise all the governmental functions necessary for the purpose, and also authorized it to absorb the business of furnishing water for the public and private uses of the city and secure the profits. The city was not, however, required by its charter to at once construct or acquire its own water works. The limitations upon the taxing power and right to incur debt contained in the charter rendered such an undertaking on the part of the city impossible at the time when this contract was made. In view of the conditions existing under said limitations, the provisions of the charter granting 511e to the city power to authorize individuals or a private company to construct and operate water works are quite as important as and of greater utility than the power conferred upon the city to engage in the water business on its own account. It was undoubtedly intended that by means of such a contract as the one pleaded in this case the city should secure a supply of water at least during the time necessary for it to acquire sufficient means to own its water system. The city in making this contract with the complainant exercised a power granted to it expressly and specifically by the legislature, and the wisdom or reasonableness of its action in this regard cannot be questioned in the courts. 1 Dill. Mun. Corp., p. 328.

In further refutation of the argument it is to be observed that the contract reserved to the city the right to acquire the property of the water company and absorb its business on fair and just terms, so that the contract itself is in no sense obnoxious to the objection that it deprives the city government of power conferred by the legislature. Having by means of this contract induced the water company to make large investments of capital in improving and enlarging its plant, the city cannot at this time honestly destroy the value of the plant instead of purchasing or condemning and

paying for the same according to its promise. The city has not divested itself of any of its powers, and the contract constitutes no bar to the exercise thereof; but it has bound itself to take over the plant now in service and render just compensation therefor whenever it does elect to furnish water by means of works owned by it. The present scheme is therefore unlawful, because it is an attempted repudiation of a binding contract.

The aggregate amount to be paid under the contract by the city cannot be regarded as a debt incurred in excess of the amount limited by the 105th section of the charter, for, by the terms of the contract, the city became obligated to pay in quarterly installments as the same should be earned by compliance with the contract on the part of the water company. If any part of the money is not earned, the city will not have to pay it. If the money shall 511f be earned, the city will avoid an accumulation of debt by paying according to the contract. Notwithstanding the very respectable authorities cited by counsel for the city, I hold that while the contract creates a binding obligation it does not create a debt. The item of expense for water under this contract stands precisely the same as other items of regular current expenses incidental to running the government and provided for by contracts or ordinances of the city.

Let an injunction issue as prayed for.

512 In the Circuit Court of the United States for the District of Washington, Southern Division. In Chancery.

THE WALLA WALLA WATER COMPANY, a Corporation Organized }
and Existing under and by Virtue of the Laws of the State of }
Washington, Plaintiff and Respondent, }

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. }
Roberts, Mayor of said City; Henry Kelling, Clerk of said City, }
and Robert G. Parks, the Treasurer of said City, and Daniel }
Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. }
Jones, E. H. Massam, and Norman F. Butler, Members of and }
Constituting the Common Council of said City, Defendants and }
Appellants. }

The above-named defendants, The City of Walla Walla, a municipal corporation; John L. Roberts, mayor of said city; Henry Kelling, clerk of said city, and Robert G. Parks, the treasurer of said city, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, members of and constituting the common council of said city, feeling themselves ag-grieved by the decree entered on the eighth day of May, 1895, in the above-entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States, and they pray that this their said appeal may be allowed, and that a

513 transcript of the record and proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed)

WILLIAM T. DOVELL,

JAS. HAMILTON LEWIS,

Solicitor for Defendants and Appellants,
101 to 106 Occidental Block, Seattle, Washington.

Seattle, December 12th, 1895.

And now, to wit, on the twelfth day of December, 1895, it is ordered that the appeal be allowed as prayed for.

(Signed)

C. H. HANFORD,

District Judge.

514 (Endorsed on back as follows:) Original. No. —. In the circuit court of the United States for the district of Washington, northern division. The Walla Walla Water Company, plaintiff and respondent, *vs.* The City of Walla Walla *et al.*, defendants and appellants. Petition and order allowing appeal. Stratton, Lewis & Gilman, attorneys for defendants and appellants, 101-106 Occidental block, Seattle. Copy of within petition and order received and due service of the same acknowledged this 18th day of December, 1895. Geo. Turner, solicitor for complainant and respondent. Filed Dec. 21st, 1895. A. Reeves Ayres, clerk, (signed) by W. H. Kirkman, deputy.

515 In the Circuit Court of the United States for the District of Washington, Southern Division. In Chancery.

THE WALLA WALLA WATER COMPANY, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Washington, Plaintiff and Respondent,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City, and Robert G. Parks, the Treasurer of said City, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of and Constituting the Common Council of said City, Defendants and Appellants.

Know all men by these presents that we, The City of Walla Walla, a municipal corporation; John L. Roberts, mayor of said city; Alex. Mackay, clerk of said city; Robert G. Parks, treasurer of said city; A. K. Dice, V. D. Lambert, Milton Evans, Jacob Betz, Marshall Martin, E. H. Massam, and John Lamb, members of and constituting the common council of said city, as principals, and Harry Krutz, John P. Kent, and Wm. G. Cullen, as surety, of the city of Walla Walla and State of Washington, are held and firmly bound unto the above-named Walla Walla Water Company, a cor-

poration, in the sum of one thousand (\$1,000.00) dollars, to be paid to the said Walla Walla Water Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of September, 1895.

516 Whereas the above-named defendants, The City of Walla Walla, a municipal corporation; John L. Roberts, mayor of said city; Henry Kelling, clerk of said city; Robert G. Parks, treasurer of said city, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, members of and constituting the common council of said city, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the district of Washington, southern division:

Now, therefore, the condition of this obligation is such that if the above-named defendants, The City of Walla Walla, a municipal corporation; John L. Roberts, mayor of said city; Henry Kelling, clerk of said city; Robert G. Parks, treasurer of said city, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, members of and constituting the common council of said city, shall prosecute said appeal to effect and answer all damages and costs if they fail to make the said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE CITY OF WALLA WALLA,	[SEAL.]
By JOHN L. ROBERTS, <i>Mayor</i> .	[SEAL.]
ALEX. MACKAY, <i>Clerk</i> .	[SEAL.]
MARSHALL MARTIN.	[SEAL.]
MILTON EVANS.	[SEAL.]
E. H. MASSAM.	[SEAL.]
HARRY KRUTZ.	[SEAL.]
JOHN P. KENT.	[SEAL.]
WM. G. CULLEN.	[SEAL.]
JOHN L. ROBERTS.	[SEAL.]
V. D. LAMBERT.	[SEAL.]
J. D. LAMB.	[SEAL.]
JACOB BETZ.	[SEAL.]
ALEX. MACKAY.	[SEAL.]
A. K. DICE.	[SEAL.]
R. G. PARKS.	[SEAL.]

517 Sealed and delivered and taken and acknowledged this 28th day of September, 1895, before me—

W. H. KIRKMAN,
U. S. Commissioner.

Approved by—
C. H. HANFORD,
District Judge.

518 (Endorsed on back as follows:) No. —. In the circuit court of the United States for the district of Washington, northern division. The Walla Walla Water Company, plaintiff and respondent, *vs.* The City of Walla Walla *et al.*, defendants and appellants. Bond on appeal. Stratton, Lewis & Gilman, attorneys for defendants and appellants, 191-106 Occidental block, Seattle. Copy of within bond received and due service of the same acknowledged this 18th day of December, 1895. Geo. Turner, solicitor for complainant and respondent. Filed Dec. 21st, 1895. A. Reeves Ayres, by W. H. Kirkman, deputy.

519 In the Circuit Court of the United States, District of Washington, Southern Division.

THE WALLA WALLA WATER COMPANY, a Corporation)
Organized and Existing under and by Virtue of the)
Laws of the State of Washington, Plaintiff.)

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation ;
John L. Roberts, Mayor of said City ; Henry Kelling, } No. 103.
Clerk of said City, and Robert G. Parks, the Treasurer
of said City, and Daniel Stewart, John G. Muntinga,
B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam,
and Norman F. Butler, Members of and Constituting
the Council of said City, Defendants. }

Certificate to Transcript.

I, A. Reeves Ayres, clerk of the circuit court of the United States of America for the district of Washington, ninth judicial circuit, do hereby certify the foregoing 518 written pages, numbered from 1 to 518, inclusive, to be a full, true, and correct copy of the records, papers, and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court, and that the same constitutes the transcript of record on appeal to the United States Supreme Court.

I further certify that the cost of the foregoing transcript of record is the sum of \$311.50, and that said sum of \$311.50 was paid by The City of Walla Walla, appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court this 16th day of June, A. D. 1896.

{ Seal United States Circuit Court, District of }
Washington, Southern Division. }

A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By W. H. KIRKMAN, Deputy.

520 In the Circuit Court of the United States for the District of Washington, Southern Division. In Chancery.

THE WALLA WALLA WATER COMPANY, a Corporation Organized and Existing under and by Virtue of the Laws of the State of Washington, Plaintiff and Respondent,

vs.

THE CITY OF WALLA WALLA, a Municipal Corporation; JOHN L. Roberts, Mayor of said City; Henry Kelling, Clerk of said City, and Robert G. Parks, the Treasurer of said City, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, Members of and Constituting the Common Council of said city, Defendants and Appellants.

UNITED STATES OF AMERICA, 88 :

To the Walla Walla Water Company, a corporation, Greeting :

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, southern division, wherein The Walla Walla Water Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, is plaintiff and respondent and The City of Walla Walla, a municipal corporation; John L. Roberts, mayor of said city; Henry Kelling, clerk of said city, and Robert G. Parks, the treasurer of said city, and Daniel Stewart, John G. Muntinga, B. D. Crocker, Jacob Betz, John L. Jones, E. H. Massam, and Norman F. Butler, members of and constituting the common council of said city, are defendants and appellants, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done *with* the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice
521 of the United States, this 12th day of December, in the year of our Lord one thousand eight hundred and ninety-five.

C. H. HANFORD,

District Judge.

[Endorsed :] No. —. In the circuit court of the United States for the district of Washington, southern division. Walla Walla Water Co., plaintiff, *vs.* City of Walla Walla *et al.*, defendant. Citation. Stratton, Lewis & Gilman, attorneys for defts, 101-106 Occidental block, Seattle. Copy of within citation received and due service of the same acknowledged this 18th day of December, 1895. George Turner, solicitor for complainant and respondent. Filed Dec. 21st, 1895. A. Reeves Ayres, clerk, by W. H. Kirkman, deputy.

Endorsed on cover: Case No. 16,416. Washington C. C. U. S. Term No., 637. The City of Walla Walla *et al.*, appellants, *vs.* The Walla Walla Water Company. Filed October 19th, 1896.

Dec. 20 1897
JAMES H. MCKENNEY
CLERK

Dec. 20 1897
J. H. Lewis, Garland & Garland
For Apprs.

Filed ^{IN THE} Dec. 20, 1897.
Supreme Court of the United States.

October Term, 1897.

THE CITY OF WALLA WALLA ET AL.,
Appellants,

vs.

No. 250.

THE WALLA WALLA WATER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF WASHINGTON.

BRIEF FOR APPELLANTS.

J. HAMILTON LEWIS,
A. H. GARLAND,
R. GARLAND,

For Appellants.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 250.

THE CITY OF WALLA WALLA *et al.*, Appellants,

vs.

THE WALLA WALLA WATER COMPANY.

**Appeal from the Circuit Court of the United States
for the District of Washington.**

Brief for Appellants.

The bill of the complainant (by appellees here), omitting unnecessary recitals, sets forth the following:

- 1st. The City of Walla Walla is an incorporated city.
- 2d. That the Water Company is an incorporated company.
- 3d. That the complainant entered into a contract with the defendant city to furnish water.
- 4th. The contract for twenty-five years, and exclusive.
- 5th. Defendant agreed to pay fifteen hundred dollars per annum rent.

6th. That complainant built improvements for the purposes of the contract to the amount of fifty thousand dollars.

7th. That the city, after eight years subsequent to the contract, decided to build new water-works.

8th. That such course was threatened and would deprive complainant of its annual rent and depreciate the value of its plant.

9th. Seeks injunction upon the ground that the threats to build water-works, if executed, would impair the obligation of complainant's contract, and be within the inhibition of the Constitution of the United States.—Rec. 1-17.

To this bill there was filed a demurrer.—Rec. 18.

This demurer was overruled by the lower court, exceptions being duly allowed.—Rec. 19.

First Assignment of Error.

The demurrer should have been sustained.

From the allegations of the bill there was no *jurisdiction* in the United States Circuit Court to take cognizance of the cause.

1st. There was no diversity of citizenship.

2d. *There was no question arising under the Constitution or laws of the United States.*

The following argument will comprehend both the second and third grounds of the demurrer :

It is admitted that both complainant and respondent are citizens of the State of Washington, and that all the parties to the litigation are citizens of the State of Washington, and were at all times in the complaint named

It is contended that the court assumes jurisdiction because of the allegation that the acts of the defendant will, if consummated, impair the obligation of the complainant's contract, and thus be in violation of section 10 of the Constitution of the United States forbidding any State to pass a law impairing the obligation of contracts.

We insist that upon the face of the bill it appears that the State of Washington is in no wise threatening or attempting to impair or affect in any wise the contract of the complainant, admitting that a municipal corporation will be regarded as the State wherever, in the exercise of its agency of the State, it assumes as such agent to do a thing which, were it attempted by the State, would be within the purview of the law forbidding such.

It is upon this premise or hypothesis that the complainant assumedly founds its complaint. We insist that from the allegations of the bill such assumption is apparently wrongfully founded and indulged without any authority of law.

We admit that where a city acts as an agent of the State and is proceeding to do a thing which would be clearly in violation of section 10 of the Federal Constitution, the Federal court would have jurisdiction irrespective of citizenship.

But, we likewise insist that there is a failure in the complaint, as likewise by the court below, to distinguish between acts of a municipality which are governmental or within the line of the agency of a State, and those acts which are clearly in the exercise of the municipality's business arrangements where its doings are but the execution of the will of the municipality.

We insist that a matter connected with the police power, looking to the regulation of its peace, of restraint of nuisances, protection of health, would be the exercise of its governmental department, and such acts would be

in the exercise of its agency of the State; but we urge that acts, such as making of contracts through its council for the furnishing of water to the city court-house, or of oil to the city jail, or of water to the municipal head-quarter's building, or of water to all of the buildings of the people of the city, who may desire to use the same, is but the exercise of the city's business department, is related only and wholly to its citizens; the council in such case, as trustees for the citizens, should stand in the relation to them as stockholders to directors in private corporations, and in these matters the council of the city and the city itself is but the agent and trustee of the citizens of that city, and in no wise the agent of the State.

To this end we, therefore, urge that as the city is therefore in the discharge of such duties as is alleged against it, the agent of the city and its citizens, exercising a power as a trustee of the citizens, it, in such conduct, derives no power from the State, and in the exercise of such matters in no wise represents the State. For this reason it can not be regarded as an agent of the State, the State can not be regarded as its principal, therefore the State can not be charged as being the actor in the proceeding, whether it be the making of the contract or the impairing of an obligation of one. Consequently the State in no wise, upon the admitted facts, is the impairer by legislation or otherwise of the contract.

For this reason, the Constitution of the United States, within its meaning literally construed, as for the purposes of jurisdiction it must be, has no application, and the Federal court therefore clearly would have no jurisdiction.

Plainly, this case, upon the admitted facts of the bill, if well pleaded, a violation of a contract by a citizen of the State, affords remedies under the ordinary legal and equitable law within that State.

Thereupon the demurrer should be sustained for want of jurisdiction in the lower court.

Following we present references upon this subject of all classes of cases :

To illustrate with more definiteness than we assume in this brief, the distinction in the relation of the municipality to the State, we quote the words of the Supreme Court of Ohio upon analogous questions in *Western College vs. City of Cleveland*, 12 Ohio St., 377.

"Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals, of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations, to preserve the peace and protect persons and property when they are to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the property comprised within the limits of the corporation, and its adaptation for the purposes of residence and business. As to the first, the municipal corporation represents the State; as to the second, the municipal corporation represents the pecuniary and proprietary interest of the individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

Upon this distinction, more fully reported, the Circuit Court of Appeals for the Fifth Circuit, denied that the city of New Orleans was the agent of Louisiana in her violations of the contract of security to the home of certain Italians within her midst.

New Orleans vs. Abnagatto, 10 C. C. A., p. 361.

The Supreme Court of New York in *Mazmilian vs. Mayer*, 62 N. Y., 160, by Folger, J., says:

"There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual. The other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. * * * In the exercise of the former power, and under the duty to the public, which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for failure to use its power well, or for any injury caused by using it badly; but where the power * * * is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents."

This distinction, so well founded and recognized now, was urged, and with some enlargement, particularly applicable to this case, was adopted by the Circuit Court of Appeals (Fourth Circuit), in *Safety Insulated Co. vs. Mayor of Baltimore*, 13 C. C. A. Rep., p. 377, et seq.

In this case the City of Baltimore had contracted with an electric light company to provide lights for the city upon certain terms of rent, etc. The action is one at law, recognizing that one in equity was not tenable. In discussing the distinction here made which was therein referred to, the court said:

"The court was in error in not discriminating between the acts of the municipal corporation when acting in its governmental capacity and when act-

ing as a property holder, and putting contracts made in these different capacities upon the same level of liability for nonperformance. * * * The position taken by the defendant is that the city council, in passing this ordinance, advertising for bids, accepting this bid, and engaging in this work, acted in its governmental capacity, and that no contract so made is irrevocable. It seems to be a contradiction in terms to speak of a contract revocable at the will of one of the contracting parties. Be this as it may, municipal corporations, confining the term to cities and towns, possess a double character, the one governmental, legislative or public; the other in a sense proprietary or private. In its governmental or public character, the corporation is made by the State one of its instruments, the local depository of certain limited and prescribed political powers to be exercised for the public good on behalf of the State and not for itself. These legislative or governmental powers they can not cede away or control or embarrass by any contract disabling them from performing their public duties. *Western Saving Fund Soc. v. City of Philadelphia*, 31 Pa. St., 182. Such contracts necessarily are void *ab initio*. They are not within the scope of the powers of the corporation. But in its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the State at large, but for the private advantage of the particular corporation as a distinct legal personality. As to such powers, and as to the property acquired thereunder and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* a private corporation.

This whole question was discussed in its application to the subject-matter precisely as at bar, by the Circuit Court of Appeals for the Eighth Circuit, in *Illinois Trust Company vs. Arkansas City*, 22 C. C. A., Rep. 181.

In which the court, advertng to the failure of the lower court to recognize the distinction, has to say :

"First, it ignores the settled distinction between the governmental or public, and the proprietary or business powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers, the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation."

We incline to the view that this is the first time this distinction is sought with a view of denouncing jurisdiction in the Federal court, where jurisdiction is sought upon the ground of the city's agency of a State within section 10 of the Constitution.

Our search, however, clearly demonstrates that the distinction here as to the respective sources from which each power is drawn, to wit, the duty of its governmental capacity as being drawn from the State, and its duties in its business capacity being drawn solely from the people of the municipality, and in no wise related in the form

of agency or other governmental relations to the State, is amply borne out by the following cases :

Com. vs. Philadelphia, 132 Pa. St., 288.

New Orleans Gas Light Co. vs. New Orleans, 42 La. Ann., 188.

Wagner vs. Rock Island, 146, Ill., 139.

Vincennes vs. Gas Light Company, 132 Ind., 114.

Indianapolis vs. Indianapolis Gas Light Co., 136 Ind., 396.

Reed vs. Atlantic City, 49 N. J. Law, 558.

The full subject has received consideration, as a matter of course, in the copious work of Judge Dillon on Municipal Corporations (3d Ed., Sec. 66) ; and, subsequently in the 4th Edition, adopting with extension the views urged by the supreme court of New York.

(Secs. 966, 968, 974.)

Then the question is at once presented: Is the contracting for water not purely the exercising of the business functions of the city, and wholly separate from any relation of sovereignty or agency of a State? Is not the contract, as urged in the complaint, but one for the benefit of the citizens through their agent, the city for a single and sole purpose of the personal benefit of the citizens? Is it not one that does not relate to the government of the inhabitants, but to obtain merely a private benefit for the city and its denizens? We respectfully insist that such has been decided and established to be the law.

“ In contracting for water-works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its citi-

zens." Opinion by Sanborn, J., in *Trust Company vs. Arkansas City*, 22 C. C. A. Rep., 182.

City of Cincinnati vs. Cameron, 33 Ohio St., 336.

Safety Wire and Cable Co. vs. Baltimore 13 C. C. A. Rep., 375.

From all this, it must appear that the alleged acts against the city are not of a nature to constitute it as the representative of the State, by which the remedy of the complainant, if any, can be regarded as being within the constitutional clause inveighing against the State impairing the obligation of contracts.

For this reason, the Constitution is not brought into question—merely the ordinary principles of equity between citizens of the same State, out of which clearly there can not attach any jurisdiction to the United States courts, but wholly to the local tribunals at the residence of the litigants.

Jurisdiction.

II.

Admitting, for the demurrer's sake, that the acts complained of are properly pleaded and are sufficient to come within the constitutional provisions, still the court is clearly without jurisdiction of the subject-matter, because the complaint is wholly devoid of facts showing any matters or acts which would as facts or acts vest the jurisdiction. A terse analysis of the bill discloses this. Its statements are:

1. A contract and ordinance recited.
2. A determination of the city to build a water-works, and ordinance recited.
3. That the property of the complainant will be annihilated. (In what way or by what result or what would

produce the annihilation, whether the result of competition or the falling of the price or the failure of the city to pay rent or what is not stated.)

4. That the city's competition would deprive it, the complainant, of its fifteen hundred dollars a year presumably. (No certain allegation that the city has so threatened, no allegation that the city has ever said it would refuse to pay the rent, or would decline to pay the rent, or that any demand had been made upon the city to continue to pay the rent, and that such had been refused, nor any facts showing why the conclusion is drawn.)

5. That its plant, worth fifty thousand dollars, would be depreciated in worth and value by the action of the city. (How is not asserted, whether depreciated in value in the estimate of the city or in the estimate of the complainant or because the citizens of the city would take water from the city rather than from the complainant is not shown, nor is any fact alleged, save the simple fact that the value and worth or profit or proceeds from the contract would be less.) Such conclusions show no infringement of a constitutional right.

Because the courts do not care, nor is it the province of the law to protect a contract from having its profits diminished or the advantages anticipated by the contractor at the time of making it, fulfilled according to the estimate. The language "impairing the obligation" means to destroy or affect the legal status or the legal and mutual obligation of the contract not its business investment, not its prospective proceeds, not its contemplated value as an enterprise.

As said by the court in *Curtis vs. Whitney*, 13 Wall., 68—

"Nor does every statute which affects the value of a contract impair its obligation. It is one of the

contingencies to which parties look in making * * * contracts that they may be affected in many ways by State and national legislation."

And as said in *Hamilton Gas Light Company vs. Hamilton*, 146 U. S., 278—

"It may be that the stockholders of the plaintiff supposed at the time * * * when they made their original investment that the city would never do what evidently is contemplated by the ordinance of 1889; and it may be that the erection and maintenance of gas-works by the city at the public expense and in competition with the plaintiff will clearly impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established; *but such considerations can not control the determination of the legal rights of the parties.*"

Therefore, from the complaint, it is apparent that if the conclusions are admitted, there is nothing which can be drawn from the Constitution which would vest jurisdiction; and as the statements are but conclusions, and altogether in order to reach a mental conclusion either of jurisdiction in the lower court or a probable one in the higher court, one must engage in the employment of presumptions that what should have proceeded in detail and that which appears to have been a consummation, if it did so proceed; and further presume that whatever wrong complainant alleges would eventually work, if uninterrupted, such an inroad upon its contract as to impair its value; and, therefore, if it shall ever become valueless, its obligation is useless, and therefore the impairing of the value is the impairing of the obligation.

But it has too often been asserted by this court that whenever, from the complaint, presumptions must be indulged, either of fact or as a condition of law, not stated

as facts when plead in detail as a matter of law, that the very necessity for the indulgence in such presumption of itself defeats jurisdiction.

In *Hanford vs. Davies*, 16 Sup. Ct. Reporter, p. 1053, the court says :

"It is well settled, that as the jurisdiction of a circuit court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction, unless the contrary affirmatively appears, and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. *Brown v. Keene*, 8 Pet., 112; *Grace v. Insurance Co.*, 109, U. S., 278, 283 (3 Sup. Ct., 207) and authorities cited. These principles have been applied in cases where the jurisdiction of the circuit court was invoked upon the ground of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same State is invoked upon the ground that the suit is one arising under the Constitution or laws of the United States. We are not required to say, that it is essential to the maintenance of the jurisdiction of the circuit court of such a suit that the pleadings should refer, in words, to the particular clause of the Constitution relied on to sustain the claim or immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance. *Ansbro vs. U. S.*, 159 U. S., 695 (16 Sup. Ct. 187").

This doctrine against a pleading averring and containing but conclusions of law, is held sufficient grounds for sustaining a demurrer in *Fogg vs. Blair*, 139 U. S., 118.

But there is another presumption essential, to be indulged in order to assume an act legally done by a city, in order to be an illegal act within the constitutional inhibition against a State's impairing the obligation of contracts. It is: Complainant in its bill alleges that the city by ordinance subsequent to its contract, to wit, on the 20th day of June, 1893, legislated to provide for itself water, and therein set out the ordinance.—Rec., 10-11.

Pleading that the ordinance was ratified by a vote of the city, and that by this latter ordinance its contract was impaired; but at no place and at no time is it stated to the court that the latter ordinance was either within any direct act or permissible provisions of the charter of the city or any act of the legislature. It is true, that in a State court, a presumption will be indulged that a power necessary for an inferior organization within that State to do a thing has preceded the doing of it until the contrary is shown; but in a Federal court, which is not a domestic court in such matters as the case at bar, and where every fact necessary to maintain jurisdiction must affirmatively be pleaded no such presumption will be indulged; but, to the contrary, the absence of the allegation will be presumed as an admission of the non-existence of the facts which should been alleged; which means, therefore, that the act or the ordinance which the complainant insists would, if executed, be an impairment of its contract, is simply one without authority of legislative grant, therefore *ultra vires*, which, rendering the ordinance itself illegal for want of authority from the State, leaves no ordinance, and the previous ordinance or the contract with the complainant, unaffected and unimpaired. The mere fact that an invalid ordinance or one without authority has been passed which might cloud some rights of the complainant as a debtor

seeking credit, is a mere matter of a private injury to it where such exists and is readily remedial in an ordinary action to have the cloud set aside or the ordinance declared illegal as the improper act of a private corporation called the city of Walla Walla, as it would have proceeded against any other private act of any other private corporation that might have illegally clouded its title. Such, however, would give no right to go into the Federal court under a claim of a constitutional right, because there are no facts showing that such illegal condition exists within the city from the preceding facts as should require the application of a constitutional principle to avoid.

This view here asserted is well sustained in the words of this court :

"The plaintiff's first contention is that there is no statute of Ohio authorizing the city, etc. * * * The jurisdiction of that court (meaning the Circuit Court of the United States) can be sustained only upon the theory that the suit is one arising under the Constitution of the United States; but the suit would not be of that character if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the city has not in any form given or attempted to give the force of law. *A municipal ordinance* not passed under supposed legislative authority can not be regarded as a law of the State within the meaning of the Constitutional prohibition against State laws impairing the obligation of contracts."

Murray vs. Charleston, 96 U. S., 432.

Lehigh vs. Easton, 121 U. S., 388.

New Orleans Water Co. vs. Louisiana Sugar Refining Co., 125 U. S., 18.

"Suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States."

"None of the presumptions essential to maintain the conclusion, either that the legislative power existed or that any other facts existed, will be indulged in order to maintain jurisdiction, and where the fact is not stated the absence of such statement would defeat jurisdiction or create the presumption of the want of jurisdiction."

II.

Demurrer—Want of Equity.

From the allegations of the bill, taking the facts to be well pleaded, there is nothing upon which a court should grant relief, either in the form of injunction or any other equitable remedy.

We will here discuss one or two of the general phases necessary to the demurrer, and will leave the remaining and more important one, to wit, the question of the power of the city to make as a valid contract the contract alleged in the bill, as the closing observation in the discussion of the demurrer.

Estoppel.

1st. We insist that the complainant, by the bill, is estopped to claim that it has an exclusive right and that the city has not the right to erect water-works and supply itself with water during the term provided for the existence of complainant's contract. First, it appears from the bill that by the act incorporating the city of Walla Walla, being act of the Territory of Washington, 1883, the city of Walla Walla was endowed with the power to *erect and maintain* water-works, etc., within or without the city limits, and all regulations necessary to carry the power into effect is permitted by the act with the conditional proviso, upon which the act is dependent, that the works shall not be erected by the city until

a majority of the voters, who shall be freeholders, shall, at a general or special election, vote for the same. Rec., 1-2.

That on the 15th day of March, 1887, the city entered into the alleged contract with the complainant, in face of complainant's knowledge that an election was required and an assent at such election of a majority of the freeholders, to such contract. Such election was never had—the consent of the freeholders never given. The complainant assumes to contract for twenty-five years, upon the terms heretofore stated, permitting upon certain conditions a court to declare it forfeited, and providing in section 8 of the contract as follows :

“Neither the existence of said (this) contract nor the passage of this ordinance shall be construed to be, or be a waiver of, or relinquishment of any right of the city to take, condemn, and pay for the water rights and works of said or any company at any time,” etc.

Here is the admission of the right and privilege of the city, during the contract, to build its water-works. Here is a statement showing the knowledge of the complainant of the city's contemplation of building its water-works, and the privilege of the city to condemn any water-works or plant for this public purpose and providing only the manner in which this complainant's property shall be treated in this process of condemnation. This recognition of the right of the city to build its water-works and take complainant's property or any other, by condemnation, prohibits the complainant from contending that the city had not such power at any time. The provision merely and only reserves to the complainant the right to insist that *when the city does build it shall take complainant's property.*

This merely leaves the question as follows: That should the city build and omit to take the complainant's property by condemnation or private sale, the complainant, by virtue of this provision would have the right to recoup any loss it may suffer by reason of such failure, against the city, and that by an ordinary action at law for the value of its plant upon the assumption that the contract was a conditional sale of the same, delivery to be performed at the time the city assumed to build its water-works. Certainly this contract gives no right to the complainant to claim that the city, in undertaking to build its water-works, is acting without the object of the contract, or contemplation of the contract; for certainly the law will infer that the complainant has assumed that the city would do that which it admits is the city's privilege to do and that at such time as the city shall so elect under the law; and the complainant will not be heard to say that that which the law will insist it should naturally have assumed, it did not so assume; and for such failure of the exercise of common prudence its plain, due regard for the city's rights under the law, the complainant should not be requited by extraordinary relief in equity. Therefore this complainant in accepting this contract, with an act of the legislature empowering the city to erect its own water-works at its pleasure by vote, and it so proceeding to do, and the contract of this complainant recognizing this right and making reference to condemnation concerning it, the complainant must be held to have taken this contract, as this court has said, "And to have assented to such reservation and such condition and this assent to such conditions and such concurrence being evidenced by the complainant's accepting the contract with the knowledge and recognition in the contract of the right and privilege of the city."

Greenwood vs. Union Freight Road Co., 105 U. S., 13.
State vs. Hamilton, 47 Ohio St., 52.

Wherein the court says: Section 2486 (as does the act of 1883 under discussion) gives the power to the council either to erect gas-works or purchase works already erected. The authority granted is not coupled with any conditions, but it is to be exercised as the council may deem to be for the public good. * * * The interests of the city may demand that a gas company established and doing business, although complying with all the statutes and ordinances, should not continue in the exclusive possession of the field of operations. And referring to the fact that if the complainant should continue, that the city should not go into the business until and only when it had condemned the complainant's property and paid for it, the Supreme Court of the United States, in affirming the Supreme Court of Ohio, *supra*, say:

"If parties wish to guard against contingencies of such kinds, they must do so by such clear and explicit language as will take their contracts out of the established rules that public grants susceptible of two constructions must receive the one most favorable to the public."

To the same effect, *Stein vs. Bienville Water Company*, 144 U. S., 67, said this court:

"A corporation by accepting the grant subject to the legislative power, must be held to have assented to such reservation."

The court further say:

"It is this Arkansas law upon which the corporate existence of the company depends. It may be repealed, so that it will cease to be a law. * * * All this may be done at the pleasure of the legislature. * * * The general reservation of the power to alter, revoke or repeal a grant of special privileges necessarily implies that the power may be exercised at the pleasure of the legislature."

"The power reserved to alter, amend or repeal (as would be by the building by the city of its own works, as this works the repeal of a prior ordinance to the contrary, confessedly) a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Close v. Cemetery, 107 U. S., 466.

Water-works v. Schottler, 110 U. S., 347.

Penn. College Cases, 13 Wall., 190.

Tomlinson v. Jessup, 15 Wall., 454.

It will be observed that this is exactly what the legislature of the State of Washington did in enacting the law allowing the city to build its own works under which the ordinance complained of was passed. (See ordinance and new charter, hereinafter referred to.)

It is clear that the law in existence, together with the recognition of the same by the contract (we refer to the law of 1883) giving the city the right to build its water-works, and in no wise naming the time or conditions when the same should be done, other than having the ratification of the act by election, prohibits the complainant from claiming that such was not within the power of the city.

The reservation in paragraph 7 of the contract is as follows: "Until such contract shall have been avoided (referring to declaration of forfeiture by a court) the city of Walla Walla shall not erect, maintain or become interested in any water-works except the ones herein referred to, save as hereinafter specified."

This clause can not be urged for aught in this case. The words, "save as hereinafter specified" refer essen-

tially to section 8 of the contract, and was merely meant, clearly, to provide against the city of Walla Walla entering into a contract with a rival private water company. No reservation can be assumed to have included the intention of the city to construct its own water-works, as that is recognized as a privilege in section 8.

Clearly, therefore, this reservation in the latter part of section 7, upon which the learned court partly based some of its reasons to justify a conclusion upon another branch of the case can have no application to this question of estoppel, or in anywise correct or aid the complaint as against this apparent confession of estoppel upon the facts stated.

We respectfully insist that the act of the legislature of 1883, empowering the city to build its works, and section 8 of the contract of complainant with the city, prohibits and estops the complainant from complaining against the erection by the city of any water-works, and limits it, by the closing sentences of section seven, to an objection merely against a rival private company.

It will be noticed that sections 7 and 8, herein referred to as part of the contract of complainant, are meant to refer to the ordinance passed March 1st, 1887, setting out what the contracts shall be, and is the same as the words of the contract, as appears on page 8 of the transcript, section 13.

We refer now to the last remaining question upon this branch, as to what is the meaning of the words, "The city of Walla Walla will not erect, etc., save as herein-after specified." The word "erect" in that clause, in view of what has theretofore preceded, can only mean will not erect in any other manner than by condemnation of the complainant's property. This certainly, in view of the provisions hereinbefore referred to, to wit, that contained in section 8 of the ordinance, together

with the provisions of section 7, ordinance of date of 15th of March, 1887, which, as we have heretofore insisted, is but a contract by the city with the complainant, not to erect, but to take the erected works of the complainant by condemnation in the exercise of its public power as a city to build its water-works.

This limits the whole proposition to the single question, that the city's violation, admitted upon the allegations of the bill, is but that of erecting in a manner contrary to the contract—not that the contract prohibits all erection—merely an erection not in a manner as provided the erection should take place; that is to say, of the incorporating and including complainant's property.

What is the remedy? By this complainant's own bill, by the contract and by the act of the legislature, clearly it is the value of the complainant's property which would have been taken for its market value in the process of the city's public erection. Further than this the complainant is estopped to contend.

Complete Remedy at Law.

But the demurrer, for want of equity, must be sustained because of an apparent full and adequate remedy at law. The complaint shows the whole plant value of \$50,000; existence of contract, twenty-five years; rental per year, \$1,500—\$37,500; or full total, \$87,000.

The complaint showing city to be solvent, and for aught that appears having the full sum liable to immediate execution in the treasury—certainly in assessable property. This, upon assumption, that the whole contract becomes due upon the first breach, but gives action for the amount certain in damages readily realized in one determinate action—

Smith v. New Orleans Co., 141 U. S., 12 Sup. Ct. Rep., 113.

It will be observed that no denial or refusal of the *annual rent* of \$1,500 has ever been made or that any act of the city has ever impaired the value of the contract, except as alleged the *passing of an ordinance—no allegation of the doing anything under said ordinance*. This gives no right in equity. Courts can not set aside the ordinances of a city, or prevent their existence or passage upon the ground they might prevent the recording of a certain deed—*i. e.*, the clouding of some citizen's title to something he claimed under some *previous ordinance*. It is not the policy of equity to hastily enjoin the action of a city ordered by a majority of its people in favor of some one citizen, thus staying the whole municipal machinery, but will in all but most flagrant cases (where no other remedy or course is permissible) remit the citizen litigant to the law courts. Thus, on the assumption that the greater equity should go to the citizens who are so seriously affected, if one citizen should be allowed to urge successfully such process every time he fancied himself injured in some manner.

It being inherent right and privilege of a city to pass ordinances as its law-making body may conclude advisable.

East Hartford v. Bridge Co., 10 How., 511, 533-4 ;
Williamson v. New Jersey, 130 U. S., 189-199.

And as decisive on this view we point to the suggestions and reasonings in

Board v. Skinkle, 140 U. S., 334.

This court went into this question of the *inherent* right of municipalities to legislate on questions of *health, public morals*, and public safety, and in conclusion urged that it was beyond the city to contract these *privileges* of a people away to any person or company, by which such

legislation could be enjoined on behalf of an individual merely on allegation of *private depreciation* of his *commercial benefits* saying. It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts or the deprivation of property without due process of law, * * * etc., * * * are not violated by the legitimate exercise of legislative power in securing *the public safety, health, and morals*. The governmental power of self-protection can not be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.

New York v. N. E. Ry. Co., 152 U. S., 14 Supt. Ct. Rep., p. 440.

It is sustained as a doctrine now established in—

Beer v. Massachusetts, 97 U. S., 25 ;

Barbier v. Connolly, 113 U. S., 27 ;

Gas Co. v. Louisiana, 115 U. S., 650 ;

Budd v. New York, 143, U. S., 517.

That the question of the hardship of operation or embarrassing manner of the execution of the new law can not enter into the consideration of its constitutionality is settled. See

New York v. N. E. Ry. Co., 14 Sup. Ct. Rep., 440-441.

The objections which the defendant makes to the contract involved in this case may be considered under the following heads :

(1) The contract creates a monopoly, which, in the absence of an express grant from the legislature of

power so to do or such power necessarily implied, is void as in contravention of public policy ;

(2) The contract is void as an attempt to contract away a part of the governmental power of the city council ;

(3) The contract is void as creating an indebtedness in excess of the charter limit ;

(4) The contract is in violation of the express provisions of a general statute of the Territory of Washington.

I.

The contract is void as creating a monopoly.

The powers of the city upon the subject under consideration are found in sections 10 and 11 of the city charter. By sections 10 the city is authorized "*to grant the right to use the streets* of said city for the purpose of laying pipes intended to furnish the inhabitants of said city with light or water * * * for a term not exceeding twenty-five years." Section II provides: "The city of Walla Walla shall have power to erect and maintain water-works within or without the city limits, or to *authorize the erection* of the same for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, etc."

It may be conceded that the State, by an act of the legislature, may directly confer upon a company a monopoly of the business of supplying water to a city, and that they can in like manner authorize a city to confer such exclusive right, and that contracts entered into under such power will be sustained. We do not need to consider at this point how far the State would be bound by such contract against subsequent legislation in the exercise of its police power.

But when the right to the exercise of a monopoly is thus asserted, it must not be allowed to rest upon an uncertain or doubtful interpretation.

"The principle is that no franchise which is granted by a State is ever construed to be exclusive whether it be in the nature of a contract or not, unless it be so declared in clear terms or be necessarily implied."

Railway Company vs. Railway, 79 Alabama, 472; 2d Dill., Munic. Corp., 3d Ed., Secs. 715, 716.

"In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation."

Railroad Co., vs. Commissioners, 21 Penn., State, 22.

These cases, it is true, are constructions of the charters of private corporations; but the rule applies with at least equal force to the complainant's rights, since the complainant must rest its rights upon the charter powers conferred upon the defendant. "It is a general and undisputed proposition of law that a *municipal corporation* possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not merely convenient, but indispensable."

1 Dill. Munic. Corp. (3d Ed.), Sec. 89.

This definition of the powers of corporations has been cited and approved so often as to have an authority almost equal to a legislative declaration. There is no clause of this definition within which the power to make such a contract as the one under consideration can by any possibility be brought, unless it be the second, that it is "necessarily or fairly implied." A mere reading of the sections is enough to show that the power is not within this clause any more than the others.

But we are not without authority upon this point. The cause which have so held are numerous, and by courts of the very highest character.

Brenham vs. Water Company, 4 S. W., 143, is parallel with our case in every particular, except that it does not appear that the city had express charter power to erect water-works, which makes the case even stronger. In that case, the city charter provided that the city "should be capable of contracting and being contracted with;" should have power "to provide the city with water, to make, regulate, and establish wells, pumps, cisterns, hydrants and reservoirs in a street or elsewhere within said city, or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants," and under these powers they contracted with the company "for supplying said city and the inhabitants thereof with fresh water for domestic, manufacturing, fire, and other purposes," and they also reserve the right, after the expiration of ten years, to "purchase the water-works at such price as might be agreed upon by arbitrators." The city did not, however, attempt to preclude itself from obtaining water from any other source than the contracting company. The court say, in passing upon this contract and the charter powers under which it was made: "The city having been given such power, it must be understood that it was intended not only that it might so do, but that it should use it, if deemed necessary for the public welfare, long as the power is possessed by it; that is, until taken away by the legislaure."

"Such corporations may make or authorize contracts, but they have no power to make contracts or pass by-laws which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties."

Other cases clearly asserting the same doctrine are :

Garrison vs. City of Chicago, 7 Biss., 480 ;

Davenport vs. Kleinschmidt, 13 Pac., 249 ;

Logan vs. Paine, 43 Iowa, 524 ;

State ex rel. vs. Cincinnati Gaslight Co., 18 Ohio St., 262 ;

Minturn vs. La Rue, 23 Howard, 435 ;

Norwich Gaslight Co. vs. Norwich, 25 Conn., 19 ;

Gaslight Co. vs. Middletown, 59 New York, 231 ;

New Orleans City R. R. Co. vs. Crescent City, 12 Fed. R., 308.

II.

The contract is void as an attempt to barter away a part of the governmental power of the city council.

We think it can not be successfully questioned that the furnishing of a city with water for domestic use, extinguishment of fires, for flushing sewers, and otherwise promoting the health of the inhabitants belongs to a class known as police powers. It is well known that this class of powers covers a very wide field. The very extent of and importance of them have caused courts to be exceedingly cautious about attempting any definition of the power, lest they might thereby seem to exclude something which ought to be included. They are powers, moreover which grow and expand with the progress and requirements of an advancing civilization. It is only within a few years that the paramount importance to the public health of a pure-water supply has been recognized. The extraordinary increase of population in towns and cities in modern times, the progress of scientific discovery, the better knowledge of the conditions tending to promote or impair the health of a community have brought within the purview of the police power many subjects which but a short time ago would have been considered as having no relation to it. The best definition which

we have seen is found in 15 Am. & Eng. Enc. of Law, p. 1166, which is as follows:

"The police power of the State has not so far received a full and complete definition. It may be considered, however, to be the right of a State, of a State functionary, to prescribe the regulations for the good order, peace, health, protection, comfort, convenience, and morals of a community which do not encroach on the like power vested in Congress by the Federal Constitution, or which do not violate any of the provisions of that organic law. Of this power it may be said that it is known when and where it begins, but not when and where it terminates. It is a power in the exercise of which a man's property may be taken from him, his liberty may be shackled, and his person exposed to destruction in cases of great public emergency."

See, also—

Dili. Munic. Corp., 3d Ed., Sec. 141, 146-976 ;

and for cases in which the power has been in some measure defined :

Grant vs. City of Davenport, 36 Iowa, 402 ;

Munn vs. The People of Illinois, 97 U. S., 113 ;

Lawton vs. Steele, 152 U. S., 132 ;

Stone vs. State, 101 U. S., 814 ;

State vs. Wheeler, 44 N. J. L., 888 ;

New York vs. N. W. Ry. Co., 14 Sup. Ct. Reps., 441 ;

Insulator Co. vs. Baltimore, 13 C. C. A., 378-9.

See full discussion of the principle and facts applicable to case at bar—

Trust Co. vs. Arkansas City, 22 C. C. A., 179-80, etc.

It would be a singular process of reasoning, indeed, which would bring within the police power of a State the subject of a franchise for a ferry, the power to license hacks, to regulate express wagons, to erect and control a market or a public wharf, and which would exclude from that

power a subject so closely related to the comfort, convenience, often the health and lives of a community, as well as the safety of its property, as is the supply of water.

In *Connery vs. New Orleans Water-works Co.*, 7 Southern, II, it is expressly held that the water supply comes within the police powers of a municipal corporation.

The cases upon this subject are so numerous that the chief difficulty is in the selection. We cite, however, as fairly representing the current of authority.

Gale vs. Kalamazoo, 23 Mich., 345.

This case was decided by Judge Cooley, and there cannot be found anywhere a more intelligent or vigorous discussion of the principles which underlie the present controversy than in his opinion, nor a case more lucid and compact than the one next cited.

National Water-works vs. City of Kansas, 28 Fed. R., 921;

Illinois Canal Co. vs. St. Louis, 2 Dill., 77-85;

Lord vs. City of Oconto, 2 N. W., 785;

New Orleans City Ry. Co. vs. Crescent City Ry. Co., 12 Fed. R., 308;

Jackson Co. Horse Ry. Co. vs. Rapid Transit Co., 24 Fed. R., 307;

Saginaw Gaslight Co. vs. Saginaw, 28 Fed. R., 529-535;

Richmond Co. Gaslight Co. vs. Middleton, 59 N. Y., 238;

Presbyterian Church vs. New York, 5 Cow., 538;

Millhow vs. Sharp, 27 N. Y., 622;

Oakland vs. Carpenter, 12 Calif., 540;

Indianapolis vs. Gas Co., 66 Ind., 369.

Butchers' Union Co. vs. Crescent City, 111 U. S., 746; (41 C. R., 652);

Ill. Trust Co. vs. Arkansas City, 22 C. C. A., 179.

It may be worth while to say that the cases exhibit the vigorous and unsparing manner in which that court has applied the salutary principle for which we are contending to new facts as they arose. The first reference to the police power which we have observed in the reports of this court is in *Gosler vs. Corporation of Georgetown*, 6 Wheaton, 593, and there Chief Justice Marshall speaks upon the subject in these cautious terms :

“ When a government enters into a contract there is no doubt of its power to bind itself to any extent not prohibited by its Constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body (referring to the town of Georgetown) to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law which the legislature enables it to enact may well be questioned. *We rather think that a corporation can not abridge its own legislative powers.*”

The expression here is almost timid ; but the idea suggested, like many others of the great jurist, was instinct with vitality and power of growth. In *Chicago, etc., Ry. Co. vs. Fuller*, 17 Wal., 550, the same principle was invoked, and applied to a law requiring the posting of freight rates, and the law was sustained as a police requirement. In *Mann vs. Illinois*, 94 U. S., 113, the same power was found sufficient to sustain a law regulating elevator charges. In *North Western Fertilizing Co. vs. Hyde Park*, 97 U. S., 659, the same principle was sufficient to overthrow the alleged vested rights of a fertilizing company to continue their business after the growth of the city had rendered it obnoxious. In *Boston Beer Co. vs. Moss*, 97 U. S., 25, and in *Mugger vs. Kansas*, 123 U. S., 623, the same principle sustained prohibition laws

against the contention of manufacturers that such laws interfered with their vested right to manufacture beer. In *Patterson vs. Kentucky*, 97 U. S., 501, it sustained a law regulating the sale of illuminating oil, although the oil was a patented article.

The same fruitful principle was appealed to in the

Slaughter-house cases, III U. S., 746 ;

which have become one of the landmarks of our constitutional law. In *Barbier vs. Connolly*, 113 U. S., 27, the same comprehensive principle could regulate a Chinese laundry.

Certain cases which appear to hold contrary to the rule we assert, may be easily distinguished.

See *Connery v. New Orleans Water-works*, 7 Southern, II.

The facts in this case are too complicated to summarize conveniently, but the contract the Court was construing, so far as appears from the decision itself, was a contract for no definite time, but simply to pay a stipulated price for each hydrant used by the city. The contract was assailed upon various grounds of fraud, and as contrary to specific provisions of the charter ; but the questions here involved do not seem to have been involved in that case ; at all events, they were not considered, and the case was decided by a bare majority of the court.

Burlington Water-works Co. v. Burlington, 23 Pac., 1068, was for pay for water which had already been furnished. It was resisted ; first, on the ground that the contract with the city had been obtained by bribing the city officers ; second, because it was claimed the water was not of the quality prescribed. The proceedings by which the ordinance was passed under which the contract was made were regular on their face, and the contract, after

the ordinance was obtained, was assigned to an innocent purchaser. Upon these facts the court held that the innocent purchaser was not affected by the bribery, even if it existed, and that the city, having accepted the water for a year without complaint, was bound to pay for it; and these were the only points decided.

Des Moines Street Ry. Co. vs. Des Moines, 33 N. W., 613, is in point. There a city has granted an exclusive right to a street railway for a term of thirty years, and the court sustained the grant. We venture the assertion that the case is without precedent and without a successor. The one point upon which all the cases agree, those which recognize the right to confer an exclusive franchise, as well as those which deny it, is that a city can not grant an exclusive right to the use of its streets. The case has been criticised by Brown, J., in

Saginaw Gaslight Co. vs. Saginaw, 28 Fed. R., 536;
and in

Grand Rapids, etc., Co. vs. Grand Rapids, 33 Fed. R.,
659;

and also by the Supreme Court of Oregon in

Parkhurst vs. City of Salem, 32 Pac., 304.

Memphis vs. Deane, 8 Wal., 64,

is the case next cited. In that case what the court actually held was that they had no jurisdiction of the case. Whatever there is beyond that is *obiter*. Even in that case, however, it is said that "the contract of a city with a company to furnish gas for the city is not violated by the establishment of another gas company, nor by the city taking stock in the latter company."

Atlantic City Water-works Co. vs. Atlantic City, 6 Atl., 24, we believe is the only case which can be cited by complainant which can fairly be said to be in point in their favor. It merely holds a contract by which the city

agreed to pay a monthly stipend for water for a term of years, valid under a charter grant of power to "provide for a supply of water." But we do not believe the reasoning of this decision would lead the court to decide that the city having made one contract could not make another, or that having provided once, its power was exhausted. It seems to us that the very course of reasoning which would lead a court to enforce payment under the terms of a contract for a supply of water, would prevent a court from interfering with the city in any steps it might deem proper to take for obtaining its supply.

It is not necessary for us to maintain that the clause of the contract which required an annual payment of \$1,500 is void. But for the two provisions of section II, one of which affirmatively authorizes the city of Walla Walla to erect and maintain water-works, we should have no hesitation in admitting that the city was authorized to contract for a term of years for a supply of water. Probably in every such case the reasonableness of the length of the term would be a question open to inquiry in the courts, since any other view would result in an admission that the city council might bind the city perpetually; but even conceding that the provision in the contract to pay \$1,500 annually was within the power of the council and that there was a sufficient consideration therefor, it still leaves open the objection that the city has attempted by this contract to deprive itself of the power of resorting to any other means of obtaining a water supply, and this under a charter which expressly points out two modes of obtaining it.

The City of Louisville vs. Weidle, I. S. W., 605, is flatly in conflict with the doctrine announced by this court in the slaughter-house cases, above cited.

It is urged that the city, in making this contract, exer-

cised simply proprietary and not governmental powers. In part we think this is true ; in part we feel very sure it is not.

In order to perform almost any of its police or governmental functions, it becomes necessary for a city to contract. The employment of a policeman is a contract ; but counsel would hardly contend, we apprehend, that the city could bind itself to employ a policeman for an indefinite time, still more to contract away its power to employ additional policemen. To erect a market-house a city must enter into contracts for the employment of laborers, for the purchase of brick, to acquire a site. All such contracts are essential to the performance of its police duty and will be unhesitatingly sustained by the court. But when, in addition, the city contracts not only to erect a market-house, which is an affirmative action in the discharge of its duties, but also that it will not erect any other market-house, which is a restriction of its police power, the courts will intervene ; and this is the precise point on which the decision went in *Gale vs. Kalamazoo*, and other cases cited above.

The difficulty with the contract in question is not so much that the city agreed with the company to take water from it for a definite term as it is that they bound themselves not to exercise that discretion as to the sufficiency of the supply or quality of the water and other points, or, if they exercised it at all, to exercise it in a certain manner (?), which is a perpetual discretion, to be exercised, as was said by Justice Cooley, not once for all, but again and again, whenever in the view of the authorities for the time being it was necessary to exercise it. This distinction between an affirmative act in the discharge of its police power and an act by which it seeks to tie its hands from and after the exercise of such

power is fundamental, and a failure to observe it constitutes the essential and ineradicable vice of the contract now in question.

Westerly Water-works Co. v. Westerly, (C. C. A.) 80 Fed. Rep., 612.

Smith v. Westerly, 19 R. I., 33 (35 Atlantic, 526.)

It may be claimed by counsel for complainant that under this contract they were not bound to supply water for fire purposes. What, then, has become of the important duty of the city to provide for the extinguishment of fires which the charter inposes upon them? Fires can only be put out with water; and the city, if this contract is to stand, has put itself into a situation where its hands are absolutely tied. Is not the duty to provide for extinguishment of fires a part of the police power of the city? There can be no question under the testimony that the pressure in the mains in many places is utterly inadequate to supply even a single stream from the fire engine. But, according to what counsel for complainant may claim, that is no affair of theirs. It is the affair of the city council, however, and if there were no other objection but this, it seems to us this would be sufficient.

But recently this court, in the *Kentucky lottery case*, opinion by Mr. Justice Harlan, explodes the idea that police powers could be bartered away by contract of any kind, and held there could be no impairing of a contract where there was a modification or amendment or repeal even of the grant.

And just here we may say, if the party complaining really wanted a Federal court to pass on the case, it was not cut off in this by going to the state court (where it should have gone), on the impairing of a contract, if the highest court of the State ruled against its contention. In that event, the party had its right of review in this

court. And in the event the ruling of the highest State court should be in its favor, that was all it wanted or could get. *Rev. S.*, § 709; *Baltimore, etc., vs. Hopkins*, 130 *U. S.*, 210; and there are many, very many, other cases to the same effect.

III.

The contract is void as creating an indebtedness in excess of the charter limit:

We insist that upon the making of this contract the city of Walla Walla incurred an indebtedness of \$37,500, which, taken together with its then existing liability, was over the limit prescribed by the charter. It will be contended by complainant that the making of a contract to pay for 25 years \$1,500 per annum does not create a present indebtedness for the whole amount. If this contract is a valid contract, then the city became immediately liable to the company in the sum of \$37,500, to be paid in yearly installments of \$1,500. It would not be denied that if a bond were given to become due twenty-five years from date, an indebtedness to the full amount of the bond would be thereby presently created. This contract has the same effect. The payment must be made at some future day, and the contingency demanding payment is sure to take place irrespective of any action taken or option exercised by the city in the future.

Burlington Water Co. vs. Woodworth, 49 *Iowa*, 61;

Coulson vs. Portland, Deady, R., 481;

Salem Water Co. vs. Salem, 5 *Ore.*, 29;

Fuller vs. Chicago, 89 *Ill.*, 282;

Murphy vs. East Portland, 42 *Fed. R.*, 309;

Niles vs. Water-works, 26 *N. W.*, 524;

State ex rel. vs. Mayor of Bayonne (N. J.), 26 *Atl.*, 81;

Davenport vs. Kleinschmidt (Mont.), 13 *Pac.*, 249.

IV.

The contract is in violation of the express provisions of a general statute of the Territory of Washington :

The Legislative Assembly of Washington, for the year 1881, passed an act entitled "An act authorizing cities, incorporated towns and villages to provide for a supply of water." We think it completely disposes of this alleged contract. It is found on page 24, session laws of 1881. A reference to it will show that it provides a general and exclusive mode by which all cities, towns, and villages in the Territory shall be authorized to contract for a supply of water. The steps prescribed by that act have confessedly not been followed in the present case.

Session Laws, 1881, page 24.

This act was approved December 1, 1881. The charter of the city of Walla Walla, under which complainant claims the contract in question was authorized, took effect on January 1, 1884. If, then, the act of December 1, 1881, was in force at the time the contract in question was made, it is clear that the contract is invalid, in that it was not authorized by a vote of the people as required by section 2 of said act. It is entirely clear that this general act and the special act incorporating the city of Walla Walla are in no way inconsistent, and that the two acts must stand, and be read and construed together ; that the general act of 1881 must be read into the special act of 1884. We admit the force of the rule for which complainant will probably contend ; that legislation as to a special subject or locality supersedes prior general legislation, but the rule only obtains where the special act covers everything in the general. For example, if

that portion of the charter which authorized the city to contract for a supply of water, *provided the manner in which it should contract*; if it prescribed the number of years for which it might contract; if it prescribed an election as a precedent and the manner of holding such election; if it prescribed the number of voters whose assent was necessary; if it provided for the creation of a sinking fund to pay the indebtedness then created and the rate of interest which such indebtedness should bear; if, in short, the provision of the special charter covered any one of the many details of the general act of 1881, then it might be contended that as to that point the general act was repealed. But when the legislation merely granted to the city of Walla Walla the power to contract for a supply of water, and were silent as to the manner in which it should exercise that power, they showed conclusively their design that the city of Walla Walla should, with other cities, follow the general statute, which it did not do. We content ourselves with a citation of the authorities most in point upon this question.

Endlich Interp. St., Sec. 56.

Dil. Munic. Corp. (3d Ed.), Sec. 87.

Sutherland Sta. Const., Sec. 145.

State vs. Witter, 13 S. E. (N. C.), 328.

Talcott vs. Harbor Commissioners, 53 Cal., 199.

Baldwin vs. Green, 10 Mo., 410.

That the Legislative Assembly of the Territory of Washington had ample power to pass this act can not, we think, be questioned. It was in no way special legislation, but applied generally to all cities, towns, and villages in the Territory. The power conferred upon the Legislative Assembly by the organic act is full and complete.

Section 851, R. S.,

Which provides—

“The legislative power of every Territory shall extend to *all rightful subjects of legislation* not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposition of the soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents.”

We apprehend that the only serious contention that can be made by complainant is, that by virtue of the provisions of the act it has never gone into effect. Section 8 is as follows:

“This act, when approved by the Governor of this Territory, shall be in force upon its approval or ratification by the Congress of the United States.”

It may be contended that as Congress never, by any specific action, ratified or approved this legislation, that it has never gone into effect. We insist that this statute can have no construction, except the ordinary construction given to clauses of this kind, namely, this act should be approved by Congress in the same manner as all other acts were required to be approved. It can not be claimed that it was the intention of the legislature that the manner of approval of this act should be different from the approval of other acts. In effect, all acts of the Territory of Washington required the approbation of Congress. The organic act lays down the manner of approval.

Section 1850, R. S.,

Which reads as follows :

"All laws passed by the Legislative Assembly and Governor of any Territory except the Territories of Colorado, Dakota, Idaho, Montana, and Wyoming shall be submitted to Congress, and if disapproved shall be null and of no effect."

We believe the final clause requiring the ratification of Congress is mere surplusage, a mere affirmative assent to the organic act which provided for Congressional supervision of territorial legislation. The framers of the bill did not enact that it should have force only after its "approval," but after its "*ratification or approval*," knowing well that no act was valid without the ratification of Congress, but also knowing that Congress nearly always accorded that ratification by neglecting to disapprove. A delicate compliment to the supremacy of Congress, but written with knowledge of the law, as stated in the case of *The Miners' Bank vs. Iowa*, 12 How., 1—

"Congress, in creating the territorial governments and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity ordain a suspension of all acts proceeding from these powers until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disowned them of their very power of self preservation."

Nor is there force in the point which may be made by counsel that this act was mere tentative legislation,

drawn by the legislators who deemed its provisions for the benefit of the people of the Territory, and then humbly and fearfully submitted it to Congress. The people of the Territories were never in law, and certainly never in their own contemplation, in such a state of servitude. They were aware of all their rights; they knew the act would be submitted to Congress, and if not acceptable would be affirmatively disapproved, otherwise the ratification they expected would be tacitly given, and we contend it was thus given.

This law, of course, took the same course as all other laws passed by the Legislative Assembly of the Territory; was submitted to Congress, and by failing to disapprove, Congress thereby approved. It seems to have been the clear intention of the organic act that Territorial statutes should be submitted to Congress for examination. If Congress approved of the legislation, no action was necessary; if it disapproved, it was necessary to express that disapproval. Submission of the act, therefore, to Congress, and no action thereon by Congress, amounts to approval.

We are able, by careful research, to find two cases, one from Oregon and one from Indiana, distinctly upholding the construction for which we contend.

Biggs vs. McBride, 21 Pac. Rep., 878;

Tarleton vs. Peggs, 18 Indiana, 24;

And see *Miners' Bank of Dubuque vs. Iowa*, 12 How., 1.

In the first of the above-named cases a statute was passed by the Legislature which, by its terms, provided that the same should take effect and be in force from and after its approval by the Governor. The Governor never did approve the act, but, on the contrary, expressly disapproved it by veto. The act was passed over the

Governor's veto by the requisite constitutional majority. It was contended against this act that the contingency upon which it was going into effect had never happened, and therefore that the act had never taken effect and was not the law. This contention, however, was not sustained by the court. The court says, at page 879:

"If the words 'from and after its approval by the Governor' are to be treated as a condition precedent, as the contention assumes, then it could never take effect, for the reason the condition has never happened. But this method of treating a grave constitutional question seems scarcely satisfactory. It seems more like a quibble over words than an attempt to ascertain what the Legislature really meant by the use of the phraseology in question. I think there can be no doubt that the Legislature used the language in question in the same sense they used the words 'from and after its passage.'" And the court in this case holds that from and after its approval by the Governor meant simply that the act should take effect and be in force when the requisite conditions provided by the Constitution had been complied with. Can it not be said with equal force that the Legislative Assembly of the Territory of Washington meant simply by the language used that the act should go into effect when the provisions of the organic act had been complied with, namely, that the same had passed both houses of the Legislature, been approved by the Governor, submitted to Congress, and not repudiated by that body?

The last case above named, while not so clearly applicable, sustains the contention we make.

The section of the statute under consideration can also be given by interpretation consistent with the language used, namely, that the Legislature intended to provide

that the act should go into effect upon two contingencies ; first, approval by the Governor ; second, ratification by the Congress of the United States ; the intention of the Legislature being that " this act, when approved by the Governor of this Territory, shall be in force upon its approval," or " this act shall be in force upon its ratification by the Congress of the United States."

We submit that the act should be sustained as an expression of the legislative will, unless it clearly appears that it was the intention of the Legislature to make its going into effect contingent upon affirmative action of Congress ; and we submit that such intention does not appear by the language of the act itself, or by any considerations the courts have ever given to such provisions.

Upon the Facts,

We submit that the evidence shows that the complainant has in every wise failed to provide the city of Walla Walla water within the meaning and contemplation of the alleged contract, and for such reason should be held not entitled to relief nor aid in equity, it confessedly being a wrongdoer, and showing itself entitled to no equity against those who have suffered by the voluntary neglect of said complainant to comply with the alleged contract. We present the indexed testimony as follows, and its abstract for the information of the court, and to sustain appellants in this issue :

An examination of the testimony in this case shows the following :

1. That there is a part of the thickly-settled and central portion of the city of Walla Walla over which Walla Walla Water Company has extended its mains, and supplies the city and its inhabitants with water ;

2. That there is a large area, constantly growing in size and increasing in population, over which the mains

and pipes of the said company have not been extended and into which it has not entered, and which, from the elevation of the land, being as high, or higher, than the sources of supply, the said Water Company can not enter or supply with a gravity system.

The testimony adduced by the appellants shows that, as to the territory embraced in proposition No. 1, above, the supply in ordinary years is inadequate and unsatisfactory alike to the city for fire protection and to the inhabitants for consumption and the irrigation of lawns.

Every fireman of the city department who testified on the part of appellants complained that the supply was insufficient to furnish water enough for two engines running two streams each. See the testimony of—

	Record.
Albert E. Guichard	150, 151
Edwin G. Fanning	157
J. J. Kauffman	161
Jefferson Faucette	163, 164
William Conlan	170, 171
Henry Retzer	175
William Preston	179
Robert J. Wolff	183, 184
James Corliss	188
Robert Johnson	192
Robert Mathews	197
Henry Debus	200, 201
Arthur M. St. Clair	204
Nicholas Lux	206
Ralph E. Guichard	208
Joseph Graaff	277
Charles DeMoss	293
Peter Kauffman	294
Ralph White	297, 298

The pressure on the fire hydrants is inadequate for fire protection. See testimony of—

	Record.
Edwin G. Fanning	157, 158
Jacob Betz	214, 215, 216, 218
John L. Roberts	280, 281
George H. Sutherland	287

The pressure of the water in the mains is insufficient to give a satisfactory water supply in the second stories of business houses and residences.

	Record.
Oliver P. Barker	231
Thomas Quinn	236
A. J. York	237
John Dooly	250
Clark H. Barnett	252
Fred Talabera	262
W. A. Kelly	273
Samuel Cottrell	275
H. D. Henroid	300
Marshall Martin	303

Within the area occupied by the mains and pipes of complainants the supply to consumers is inadequate for the irrigation of lawns.

	Record.
Thomas Moore	166
George C. Johnston	168
Mezer B. Dwelley	229
Dion Keefe	233
M. McCarty	239
Andrew J. Evans	244
Andrew J. Newton	244, 245
Patrick Walsh	253, 254

	Record.
James Z. Smith	258, 259
John Lumppp	261
Fred. Tallabera	262
Charles W. Taylor	271
Marshall Martin	303, 304
Harry A. Reynolds, complainant's rebuttal, . . .	310
William Jones, complainant's rebuttal,	313, 314

The complainant, having an inadequate supply of water, has made rules limiting its use to certain hours of the day; but to prevent complaints being made, it permits infractions of its rules. See testimony of—

	Record.
George C. Johnston	169
Patrick Walsh	254
George R. Crowe	264, 265

Under the terms of the contract, the said Walla Walla Water Company, the complainant, "shall extend their system of mains as fast as the population and growth of the town shall reasonably warrant." The testimony shows that the rule for extension of mains followed by the company is to extend, if private parties, who wish to become consumers, will put in and pay for the extension. See testimony of—

	Record.
J. F. Bowman	132
Nelson Castleman	226
Henry Retzer	228
Nathaniel Webb	242
George H Snell	248
Edgar Broughton	254
George R. Crowe	264

Portions of the city of Walla Walla are too high to be supplied by complainant by their gravity system.

Henry P. Isaacs, Rec., 127, 130, as to Isaacs' addition.

Thomas Moore, Rec., 166, 167, and

George C. Johnston, Rec., 168, 169, as to Cain's addition.

Philip Yenney, Rec., 224, 225, and

George H. Snell, Rec., 248, 249, and

James Z. Smith, Rec., 259, as to Reed's addition.

Many of the mains and pipes of the said complainant are not large enough to carry sufficient water for an adequate supply to consumers along them. See testimony of—

F. M. Bowman, on cross-examination, Rec., 53 to 63.

J. F. Bowman, Rec., 130 to 140.

John L. Roberts, Rec., 141, 142.

At the time the ordinance, No. 270, of the city of Walla Walla was passed, the vote stood four in favor and three against its passage. Friends of the complainant urged upon the council that the hydrant pressure would be so great that the city could do without fire engines. See testimony of councilman—

John Manion, Rec., p. 270.

The testimony of Henry Kelling, the city clerk, and a witness for complainant, Rec., 32, shows that those who opposed the passage of the ordinance did so on the ground that the water company had not sufficient water to supply the demands of the contract.

For those additions and parts of additions, which were not at the time of the granting of the franchise, and are not now supplied with water, see the testimony of witness, Henry Kelling, Rec., 32, 33.

The season of 1893-1894 was a particularly wet season ;

the rainfall and snowfall were excessive. See testimony of—

Fitzhugh Newman, Rec., 267.

It will be seen from this examination of the evidence, that a large portion of the mains of the complainant does not exceed two inches in diameter; that the pressure and supply in its mains are not sufficient for fire protection to the city and for domestic supply and irrigation of lawns to the consumers; that the pressure is not sufficient for satisfactory use in the second stories of buildings; that a number of the additions of the city are higher than the company's reservoirs and can not be supplied from them; that a large number of additions lower than the reservoirs have not yet been supplied, and that the company extends its mains into said additions only when private citizens will put in and pay for the small pipes that will supply them with water; that the company is well aware of this inadequacy of supply, and the existing dissatisfaction, and endeavors to silence complaints by permitting its rules to be violated or suspending their enforcement.

For all the reasons herein urged, we respectfully insist, that upon both the law and the facts, this cause be reversed and order made directing a dismissal of the bill of complaint.

J. HAMILTON LEWIS,
A. H. GARLAND, and
R. C. GARLAND,
Attorneys for Appellants.

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1897.

THE CITY OF WALLA WALLA, ET AL.,
Appellants,

vs.

THE WALLA WALLA WATER COM-
PANY, *Respondent.*

No. 250.

*Appeal from the Circuit Court of the United States for the
District of Washington.*

BRIEF OF JOHN H. MITCHELL ON PART OF RESPONDENT.

This is an appeal from a final decree of the Circuit Court of the United States for the District of Washington, enjoining "the City of Walla Walla and its several officers, appellants

herein, from proceeding further to erect water works in and for the City of Walla Walla as in and by a certain ordinance of such city is proposed; and from further acquiring any property for the purpose of carrying out the scheme of water works as in such ordinance proposed, and from further expending the moneys of such city in furthering and promoting said scheme of water works, and from negotiating or selling the bonds or other securities of the City of Walla Walla for the purpose of erecting, maintaining or operating water works, and from further denying the obligations of the City of Walla Walla under its contract with respondent to obtain its water supply from respondent at the price fixed in and by such contract, and from denying its obligations under such contract, and from building, maintaining or becoming interested in any system of water works other than that belonging to respondent."

(Record, 338.)

STATEMENT OF FACTS.

It is provided in Sections 11 and 12 of Article 2 of the act incorporating the City of Walla Walla, as follows: (Act November 28, 1883, Laws Territory of Washington. Record, 1):

"SEC. 11. The City of Walla Walla shall have power to erect and maintain water works

within or without the city limits, *or to authorize the erection of the same*, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, and for the purpose of maintaining and protecting the same from injury and the water from pollution; its jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, springs, trenches, pipes and drains used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken, and to enact all ordinances and regulations necessary to carry the power herein conferred into effect; but no water works shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city or pay a property tax therein on not less than five hundred dollars worth of property, shall, at a general or special election, vote for the same. Such proposition shall be formulated and submitted not less than thirty days before election.

"SEC. 12. Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works, and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the

same may be purchased the payment of the purchase price thereof; said city shall have power to regulate and sell the water thus brought therein, and the moneys arising therefrom shall constitute a fund to be used to defray the expenses of operating the same and to pay the purchase price thereof; and said city may levy and collect a special tax each year until the necessity therefor ceases to exist, not to exceed two-tenths of one per centum. Provided, however, no such tax shall be levied or collected until the question has been submitted, as provided in section eleven (11) of this act, to electors as therein named, and a majority thereof at an election shall favor the same." (Record, 2).

It is averred in the complaint and admitted in the answer that on and prior to the fifteenth day of March, 1887, the respondent herein, who was the plaintiff in the court below, being then a corporation duly organized and existing under and by virtue of the laws of the State of Washington, was the owner of a water works plant, consisting of a water supply in the neighborhood of the City of Walla Walla, and all water mains, pipes, connections and fittings in place in the highways, streets and alleys of the City of Walla Walla, and connected with the said water supply, and was engaged in supplying the citizens and residents of the City of Walla Walla with water for compensation paid by said citizens and residents; but the said plant was considered by the

authorities of said city to be defective and insufficient to supply the City and its inhabitants with an amply supply of water; and it was deemed prudent and desirable by said authorities to contract with the plaintiff for an adequate supply of water for said city and inhabitants by means of additions and extensions to their plant, to be made by plaintiff at the expense of a large outlay of money. It is further averred in the complaint, and admitted by the answer, that the said City of Walla Walla was at that time indebted in a sum exceeding \$16,000, and that in and by Section 105 of Article 12 of its charter, it was forbidden to create an indebtedness of more than \$50,000; and further, that its revenues, including the revenues which it was authorized by law to raise by taxation, did not and would not exceed its ordinary expenditures by more than \$10,000 per annum; and further, that the cost of erecting any kind of water works for the said city, and of extending the same into the city, was more than \$50,000, and that water works to adequately supply the said city, together with the necessary adjuncts and appurtenances, could not have been erected for less than \$150,000. The answer, however, admits that the cost of erecting water works sufficient to supply said city would have been \$50,000, but denies that it would have cost \$150,000 to have erected works with the necessary adjuncts and appurtenances to adequately supply said city, or any greater sum than \$75,-

000. (See complaint, Record, 3; answer, record, 22).

The complaint further states that the plant then owned and operated by the water company, respondent herein, had cost and was worth more than \$50,000, and that the estimated cost of the additions, extensions and improvements to be made to its water works by the plaintiff in order to comply with the contract of plaintiff with defendants, was more than \$100,000. The answer of the defendants denies this, and avers that the plant then owned and operated by plaintiff had not cost to exceed \$25,000, and avers that the estimated cost of the additions, extensions and improvements to be made to plaintiff's water works did not exceed \$25,000. (See complaint, Record, 3; answer, Record, 22).

The complaint further avers that "for the reasons hereinbefore stated, and by virtue of the authority vested in it by its charter hereinbefore quoted, the council of said city, on the fifteenth day of March, 1887, duly passed an ordinance entitled 'An Ordinance to Secure a Supply of Water for the City of Walla Walla.'" The ordinance is set out in *hæc verbæ* in the complaint. (See also Record, 3-5).

The complaint further avers such ordinance was duly approved by the mayor of said city on the nineteenth day of March, 1887, and was thereafter published as required by the charter of

said city within five days thereafter, to-wit: on the twenty-fifth day of March, 1887, and the same became and ever since has been in full force and effect as a valid ordinance. The answer admits the passage of this ordinance at the time and as stated, but denies that it was passed for the reason set forth in the bill of complaint or by virtue of any authority vested in said council by its charter, and avers that such ordinance was passed without any good or sufficient reason, and that said city had no power by its charter to adopt the same. The answer admits such ordinance was, on the nineteenth day of March, 1887, approved by the mayor of said city, and was thereafter published, but denies that it ever was in full force and effect as a valid ordinance of said city, and denies that the same had at any time any force or validity whatever; that the same was *ultra vires*. (See complaint, Record, 5-6; answer, Record, 22).

The bill of complaint further avers that pursuant to the terms of such ordinance, on May 9, 1887, the plaintiff, respondent herein, and the City of Walla Walla, appellant and respondent in the court below, duly and regularly made and entered into a contract in writing, which contract is set out in such complaint. (Record, 6-8).

The bill of complaint further avers said contract was duly made, entered into and signed by the clerk of the city, for and on behalf of the said

city as in and by such ordinance directed, and was recorded by the said clerk in full in the book of said city in which such ordinances are recorded, and ever since said ninth day of May, 1887, the said contract has been a valid and binding contract between the plaintiff and the said City of Walla Walla. (Record, 87).

The answer admits this contract was entered into pursuant to the terms of said ordinance as stated in the complaint, and that such contract was in the words and figures as set forth in complainant's bill of complaint. (Record, 22). The answer, however, makes the following averment in relation thereto:

"We deny that the same was duly or regularly made or entered into, and we deny that said contract has at any time been or is now or ever was a valid or binding contract between said complainant and the said City of Walla Walla, and allege that the same is *ultra vires* and invalid."

The answer further alleges as follows:

"That the terms of said contract was (*were*) not before the same was entered into, or at any time, or at all, submitted to a vote of the taxpayers of said city at a special election called by the city council therefor, nor was the same submitted to a vote of the taxpayers at any time or at all." (Record, 22-23).

The bill of complaint further avers that pursuant to said contract and in order to comply with its terms, the plaintiff has in all respects complied with its terms and met all the obligations of said contract. (Record, 8-9).

It is further averred in the bill of complaint that the population of the City of Walla Walla at the time of the making of such contract was about four thousand inhabitants; that the population at the time of filing such bill of complaint was about seven thousand five hundred inhabitants; that the revenues which can be derived from supplying water to consumers in said city will not be sufficient to support more than one system of water works, and are not sufficient to bring adequate returns even for one system of water works; that this fact was well known to plaintiff and to the mayor and council of said city at the time of the making of said contract. (Record, 9).

The bill of complaint further avers as follows:

"That the stipulation in said contract whereby the said city agreed not to erect, maintain or become interested in any water works, except the water works of the plaintiff, formed a material part of the consideration of said contract; that the plaintiff would not have made the large expenditures before stated for extending, improving, enlarging its system but for the said stipula-

tion; that for the said city now to engage as a competitor with plaintiff in supplying the city and its inhabitants with water, with the city treasury as a reserve to draw on for the purpose of supplying deficiencies of revenue, will amount to the practical annihilation of the value of plaintiff's plant and will cause it a loss of more than one hundred and fifty thousand dollars." (Record, 9-10).

The bill of complaint further avers that notwithstanding the making of the said contract as alleged, and the faithful observance of the same by plaintiff, the council of said city, on the twentieth day of June, 1893, passed, and on the same day the mayor of said city approved, an ordinance entitled, "An Ordinance to Provide for the Construction of a System of Water Works, to Specify and Adopt the Gravity System of Water Works, to Authorize the Purchase, Condemnation and Appropriation of Lands in the City of Walla Walla and the County of Walla Walla Necessary and Expedient for the Construction and Maintenance of said Water Works, and for a Right of Way; to Declare the Estimated Cost of said Water Works, Lands and Right of Way; to Provide for Borrowing Money to be used in Payment therefor by Issuing the Negotiable Coupon Bonds of said City for the sum of \$160,000, and to Provide for the Calling of a Special Election for Submitting such Questions to the Qualified Voters of the City of Walla Walla for their Rati-

fication or Rejection." Which ordinance is set out in *hæc verba* in such complaint. (Record, 10-13).

The bill of complaint further avers:

"That an election was held in the said city on the twenty-seventh day of July, 1893, as in and by said ordinance provided, for the purposes therein stated, and it is now claimed and pretended by the said city and its said officers, including those made defendants herein, that the proposition submitted in and by said ordinance was carried by a majority sufficient to authorize the said city to erect and maintain a system of water works of its own, for the purpose of supplying itself and supplying consumers for compensation with water, and of contracting an indebtedness in the sum in said ordinance specified for said purpose, and the said city and its said officers, the defendants herein, claim and insist that its contract with this plaintiff is not a valid and binding contract, neither in respect to the stipulation binding the city not to erect, maintain or be interested in any system of water works other than those of plaintiff, nor in respect to the stipulation for the furnishing of water to the city by this plaintiff and the compensation to be paid therefor, and said city and said officers refuse to be bound by said contract or to observe the same, and said city and said officers, regardless of the rights of your orator under said contract, are proceeding to borrow money to erect

and maintain water works as in and by the ordinance last above set out and provided, and have advertised the municipal bonds of the said city to the amount of \$160,000, for sale on the thirtieth day of January, 1894, for the purpose of erecting and maintaining said water works, and threaten to, and will, on said day, unless restrained by this honorable court, sell said bonds and apply the proceeds to the erection of water works for the supplying of the inhabitants and consumers of the city with water for reward and compensation, and will become a competitor with plaintiff for the trade or custom of said inhabitants or consumers, and said City of Walla Walla is now and for some time last past has been expending large sums of money for a water supply and for the improvement of the same, and for preliminary work in connection with its proposed system of water works, and is continuing to make said expenditures and will continue to do so, and threatens to and will commence the erection of said system of water works at a large expense if it shall sell its bonds for said purpose, and threatens to and will prosecute said work to a completion, and will become a competitor with the plaintiff for the trade and custom of the consumers of water in the City of Walla Walla as soon as said work shall have been completed." (Record, 13-14).

The bill of complaint further avers that the plaintiff in the court below, respondent herein, is

the owner of property in the City of Walla Walla of the value of \$125,000, and that it pays taxes to the said city on the same; that there are more than two thousand other taxpayers in the City of Walla Walla, and that the taxable value of the property therein is more than \$3,000,000; that the contract of the said city with plaintiff is an insuperable obstacle to its erecting and maintaining water works for the supply of its inhabitants with water; that if the said city is to borrow said money and apply the same to the erection of said water works, the same will be a loss to said city and its inhabitants; that the said indebtedness can be paid, and can only be paid, by the levy and collection of taxes from the taxpayers of the said city; but the said indebtedness will become a cloud and burden upon the taxpayers in the city, and that for the said city to borrow said money and apply it as threatened and proposed is inequitable, and imposes upon the taxpayers of the said city a large and unnecessary burden, and constitutes a diversion of the revenues of said city from its treasury to an unlawful and unnecessary purpose." (Record, 14).

The bill of complaint further avers:

"That the value of its property is largely dependent on the fact of its having no competition in the City of Walla Walla, and particularly no competition from the City of Walla Walla, and on the fact of its contract right to be free from com-

petition by the City of Walla Walla during the life of its contract; that it is necessary for the plaintiff in the prosecution of its business to borrow money from time to time and to extend its credit; that the illegal action of the said city and its said officers heretofore taken, as in this bill alleged, and the threatened action of the said city in borrowing money and proceeding to erect rival and competing water works, have greatly diminished the value of the plaintiff's said property and have diminished its credit, so that it finds itself without the ability to borrow money with which to make necessary additions and repairs to its said property and to maintain the same in condition to furnish an adequate supply of water to its customers, and that the value of its properties and the sources of its credit are being still further diminished the longer said illegal pretensions are indulged in, and that plaintiff will be irreparably damaged unless this honorable court interpose and by its injunction restrain said defendants from further prosecuting their said lawless and illegal purpose." (Record, 14).

It is further averred in the bill of complaint as follows :

"That by its system of water works it furnishes to the City of Walla Walla an adequate supply of water, and of sufficient pressure for all the needful and proper purposes of said city, and at all points in said City of Walla Walla where

the same is or may be needed, and that it furnishes to all the inhabitants of said city, at a reasonable rate, and at as low a rate as any maintained on the Pacific coast, whether by private companies or by municipalities, an ample supply of pure, wholesome water, and that its water mains are extensive and well distributed throughout the city, so as to reasonably supply the entire city; and your orator alleges that there is no necessity for an additional supply of water to be furnished by the city, and that the action of the said City of Walla Walla and of its officers in attempting to violate its contract with your orator, and in attempting to build competing water works in contempt of said contract and at large expense, is an oppressive and unjust exercise of power and one which should be restrained by a court of equity." (Record, 15).

Complaint further avers that the rights of respondent under said contract are of great value, to-wit: of the value of more than \$50,000, and that the damage which will be inflicted on it if the said City of Walla Walla be allowed to repudiate its said contract and to carry out its present purpose of erecting and maintaining water works of its own, will be in excess of the sum of \$50,000. (Record, 15).

Complaint further avers as follows:

"That the City of Walla Walla and its officers, including the defendants herein, threaten to,

and unless restrained by this honorable court will, on the thirtieth day of January, 1894, proceed to sell the negotiable bonds of the City of Walla Walla for the purpose of erecting the said water works, and will immediately commence the erection of the same." (Record, 15).

The bill of complaint concludes with a prayer for perpetual injunction. (Record, 15-16).

DEMURRER TO COMPLAINT.

To this complaint, appellant, respondent below, interposed a general demurrer. (Record, 18-19). This demurrer, after argument, was overruled by the court. (Record, 19-20).

ANSWER.

Defendants in the court below, appellants herein, in addition to denials hereinbefore referred to, make further denial that complainant complied with the terms of said contract or placed or maintained the necessary water mains or connections or fittings in the highways or streets or alleys of the City of Walla Walla, or that it has at any time extended the system of mains as fast as the popu-

lation and growth of said city warranted. It makes further general denials of compliance upon the part of respondent with the terms of their contract with the city. (Record, 23).

Answer makes further denials that the revenues which can be derived from supplying water to consumers in said city are not sufficient to support more than one system of water works, or that the same are not sufficient to bring adequate returns for more than one system of water works.

The answer further denies that the said stipulation in said contract whereby it agreed not to erect, maintain or become interested in any water works except the water works of the complainant, formed the material, or any part of the consideration of said contract, and denies that the complainant would not have made large expenditures but for said stipulation.

Answer further denies that the city to now engage as a competitor with the complainant in supplying the city and its inhabitants with water with the city treasury as a reserve to draw on for the purpose of supplying deficiencies of revenue, will amount to a practical annihilation, or any annihilation of the value of complainant's plant, or that the same will cause it a loss of more than \$150,000, or a loss of any sum whatsoever; and such answer alleges that the proposed plant to be erected by said city will be more than selfsus-

taining, and that the operation of the same, instead of creating a deficiency, will produce a revenue for said city.

Answer further alleges that the present supply of water being furnished to the City of Walla Walla and the inhabitants thereof by the complainant, is entirely insufficient for domestic, sanitary or fire purposes; that the pressure is insufficient, so that in many parts of said city the water cannot be carried above the first stories of the buildings and the dwellings of the inhabitants, and that by reason thereof people dwelling in the second stories of such buildings are unable to obtain any supply of water whatever for domestic or sanitary purposes. (Record, 23-24).

The answer admits that the City of Walla Walla on the twentieth day of June, 1893, passed, and that on the same day the mayor of the City of Walla Walla approved, the ordinance set forth in complainant's bill of complaint, and that pursuant to such ordinance an election was held in said city on the twenty-seventh day of July, 1893, of which due notice was given. It admits that the proposition submitted in and by said ordinance was carried by a majority sufficient to authorize the said city to erect and maintain a system of water works of its own for the purpose of supplying the consumers with water, and for contracting an indebtedness in the sum specified

in said ordinance for said purpose. (Record, 24 and 25).

The answer further states as follows :

"We admit that the defendants herein claim and insist that defendant's alleged contract with complainant is not a valid and binding contract so far as concerns the stipulation binding the city not to erect or maintain or become interested in any system of water works other than those of complainant. We deny that said city or its officers have refused to be bound to said contract or to observe the same, except so far as concerns the stipulation that said city should not erect water works of its own." (Record, 25).

The answer further admits that appellant, respondent below, had already advertised the municipal bonds of said city to the amount of one hundred and sixty thousand dollars for sale on the thirtieth day of January, 1894, for the purpose of erecting and maintaining said water works, and that said city intends to sell said bonds and apply the proceeds to the erection of said water works for the supply of the inhabitants and consumers of said city with water for award and compensation.

It further admits that said city will become a competitor with the plaintiff for the trade and custom of said inhabitants and consumers. Admits that the said City of Walla Walla has ex-

pended the necessary sums of money for obtaining a water supply, and for preliminary work in connection with its proposed system of water works; that it intends, unless restrained by this honorable court, to continue to make such expenditures and to commence the erection of said system of water works if it shall sell its said bonds for such purpose; admits that it intends, unless restrained by said court, to prosecute said work to a completion, and for compensation to supply the consumers of water in the City of Walla Walla with water. Admits that the complainant is the owner of property in the City of Walla Walla. Denies that the same is of the value of one hundred and twenty-five thousand dollars, or any sum to exceed fifty thousand dollars, upon which said sum it pays taxes to said city. Admits that there are more than two thousand taxpayers in the City of Walla Walla, and that the taxable value of the property therein is more than three million dollars. (Record, 25).

The answer further denies that if the defendants are permitted to borrow money and apply the same to the erection of water works the same will be wholly lost, or lost at all, to the said city or its inhabitants; denies that said inhabitants will be paid, and can only be paid, by the levy and collection of taxes from the taxpayers of the city, and alleges that the greater portion, if not the whole thereof, can be paid by the revenues of the water works so to be erected. Denies that

said indebtedness will become a cloud or burden upon all or any of the taxable property in said city; denies that for the said city to borrow said money and apply it as proposed is inequitable, or that the same imposes upon the taxpayers of said city a large or unnecessary burden, or any burden whatever; denies that the same constitutes a diversion of the revenues of said city from its treasury to any unlawful or unnecessary purpose; denies that the value of property of complainant is wholly dependent on the fact of its having no competition in or from the City of Walla Walla; denies that by its alleged contract it had the right to be free from competition by the City of Walla Walla during the life of said alleged contract; denies that it is necessary for the complainant in the prosecution of its business to borrow money from time to time or at all to extend its credit. Denies that any illegal action of the said city or its officers heretofore taken or proposed to be taken in borrowing money and proceeding to erect water works has greatly diminished the value of complainant's property or its credit. Denies that the complainant will be in any way damaged by the proposed action of the city. (Record, 26).

Answer concludes as follows :

"We submit that the City of Walla Walla has the right, power and authority to erect said water works, and to furnish said city and the inhabit-

ants thereof with a supply of water as is contemplated and proposed by its ordinance hereinbefore mentioned; and we further submit that this court has no jurisdiction of the subject matter in this action, and that the restraining order heretofore awarded against these defendants should be dissolved and that complainant's said bill ought to be dismissed with costs." (Record, 27).

REPLY.

To this answer the complainant in the court below, respondent herein, interposed the following reply:

"This repliant, the Walla Walla Water Company, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and

sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed." (Record, 28).

TRIAL.

On these issues the cause came on for trial at Walla Walla, September 25, 1894, Hon. C. H. Hanford, United States District Judge, presiding. A great number of witnesses were examined both upon the part of the complainant and respondent. This testimony related mainly to the issue presented by the pleadings as to whether plaintiffs, respondents herein, had substantially complied with the terms of their contract with the city.

Without attempting to analyze this mass of testimony in this brief it is safe to say that it will clearly appear to the court from its examination that the complainant had in all respects substantially complied with all the terms and obligations as specified in such contract. (Record, 31-336).

And indeed it appears from the record that it was conceded on the argument of the case in the court below by counsel for respondent that such was the case. The court below in its opinion says:

"In their argument upon the hearing, counsel for the defendants have admitted that if the contract set forth in the bill of complaint is not unlawful, the case is within the jurisdiction of this court, and the complainant is entitled to the relief prayed for on the ground above specified." (Record, 343).

PLAINTIFFS IN ERROR CAN NOT IN THIS PROCEEDING BE PERMITTED TO INSIST THAT THE WATER COMPANY FAILED TO COMPLY WITH THEIR CONTRACT.

If there were any failure upon the part of the water company to comply substantially with their contract, then the city should have proceeded in the manner stipulated in the contract to ascertain and determine that fact. The provision as to how this contract should be avoided on account of any substantial failure upon the part of the water company to comply with its provisions, was as much a part of the contract as was any other provision in it (Record, 5), and a proceeding upon the part of the city in accordance with this provision, and the obtaining of a judgment of a court of competent jurisdiction, were indispensable conditions precedent to the right upon the part of the city to make any claim that there was any substantial, or other, failure upon the part of the water company. In other words,

the appellant, not having proceeded in avoiding the contract in the way it pointed out, are estopped from questioning it in this proceeding *for that reason*.

It is conceded the question as to whether the contract as a whole is *ultra vires* is an open one, and this the appellants may rightfully insist upon, but while this is so they are estopped, it is respectfully submitted, from setting up as a matter of defense in this suit that the water company has not complied with its provisions. If the contract as a whole is *ultra vires*, that settles it, and this case should be reversed. If it is such a contract, however, as the city has the power to make, then the appellants in error cannot be heard to say in *this proceeding* that there has been any failure upon the part of the water company to furnish an ample supply of water, inasmuch as it is a part of the contract itself that such question shall be determined in *another manner* before its obligation can be impaired by an ordinance of the city.

The provision in the contract is as follows :

"And this contract shall be voidable by the City of Walla Walla so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the said company to keep or perform any agreement or contract on

its part herein specified or in said contract contained; but accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any water works, except the ones herein referred to, save as hereinafter specified."

But, again, while it is true no amount of ratification can make an *ultra vires* contract valid, yet if it shall be determined that this contract was not *ultra vires*, and conceding for the argument the right of the plaintiffs in error to raise the question as to failure to perform, then in such event the appellants are brought within the rule as to waiver and ratification.

So far as appears from the record this contract between the city and the water company and the full performance of all conditions by the water company were repeatedly and continuously recognized by both the city and water company from the date of the contract, May 9, 1887, until the passage of the ordinance providing for new water works by the city, June 20, 1893, a period of over six years; and during all this time no complaint on the part of the city was made, so far as the record shows, of any failure whatever upon the part of the water company, and no steps whatever were taken as provided in the contract itself for the purpose of having it avoided because

of any failure upon the part of the water company.

FINDINGS OF THE COURT.

It will be seen from the record that the court below found:

FIRST—"That the said plaintiff has at all times substantially complied with all the terms and conditions on its part in said contract agreed to be kept and performed, and that said contract has never been avoided by the City of Walla Walla, nor has any court of competent jurisdiction ever avoided the same, or decided or decreed that there had been a substantial or other failure on the part of the plaintiff to keep, maintain and furnish to the City of Walla Walla and its inhabitants an ample supply of good, wholesome water at reasonable rates, or a substantial failure on the part of the plaintiff to keep and perform the covenants and agreements on its part in the said contract specified." (Record, 337).

SECOND—"That the City of Walla Walla, and the other defendants, the officers of the said City of Walla Walla, are threatening to and are about to violate the said contract by erecting, building and operating water works belonging to the City of Walla Walla in opposition to those of the plaintiff, and by engaging as a competitor with

plaintiff in supplying the city and its inhabitants with water, and that said action will result in impairing the obligation of said contract, and constitutes a wrong remediable in this court by injunction," (Record, 337-338).

Based upon such findings the court directed a perpetual injunction to issue as prayed for and that the City of Walla Walla pay the costs and disbursements to be taxed. (Record, 338).

LEGAL POINTS.

FIRST.

Assuming, then, as we do, that the complainant in the court below complied substantially with all the obligations of the contract set out in the pleadings, the legal questions for the consideration of this court are these:

POINT I.

First—Do the writings set out in the bill of complaint, namely, the ordinance of the City of Walla Walla, passed the council March 15, 1887, and approved by the Mayor March 19, 1887, (Record 3-5), and the contract in writing made in pursuance thereof May 9, 1887, (Record, 6-8), constitute a valid and binding contract between the complainant, the Walla Walla Water Com-

pany and the City of Walla Walla, and is this contract protected by Section 10, Article 1, of the constitution of the United States?

Second—If they do, and assuming it to be true, and this is clearly apparent from the record, that such contract has never been avoided by the City of Walla Walla, that no court of competent jurisdiction has ever avoided the same, or decided or decreed that there has been a substantial, or other, failure on the part of complainant to keep, maintain and furnish to the City of Walla Walla, and its inhabitants, an ample supply of good, wholesome water at reasonable rates, then, is it true that appellants were threatening to, and were about to, violate the said contract by erecting, building and operating water works belonging to the City of Walla Walla, in opposition to those of the plaintiff, and by engaging as a competitor in supplying the said city and its inhabitants with water? And does the act upon the part of the city and its officers, appellants herein, in passing the ordinance approved March 19, 1887, and their proceedings thereunder, impair the obligation of such contract, and do such acts constitute a law and come within the inhibition of that clause of the national constitution (Section 10, Article 1) prohibiting a state from passing any law impairing the obligation of contracts?

Third—Had the circuit court jurisdiction to restrain the City of Walla Walla and its officers

by the process of injunction from further proceedings under such ordinance?

It is contended upon the part of appellants that the contract between the City of Walla Walla and respondents is invalid for two reasons :

First—it is contended that the power to construct and maintain water works conferred upon the city by its charter is a part of the legislative and governmental functions which cannot be abrogated by any act or contract of the city; and,

Second—that the contract to pay for supplying the city with water for municipal purposes in quarterly installments, at the rate of \$1,500 per annum for twenty-five years, created a debt, which, together with other existing indebtedness, amounted to a sum exceeding fifty thousand dollars, contrary to the one hundred and fifth section of the charter.

It is respectfully suggested neither of these contentions can be maintained.

POINT II.

THE CITY OF WALLA WALLA HAD FULL POWER
TO AUTHORIZE RESPONDENT TO CONSTRUCT
AND MAINTAIN WATER WORKS.

The power to construct and maintain water works for the use of the municipality of Walla Walla was not by its charter limited to the city

alone. The city, by section 11 of its act of incorporation (Record, 2), was not only clothed with power to erect and maintain water works within or without the city limits, but it was further n vested with power "*to authorize*" the erection and maintenance of such works for the purpose of supplying the city with water, and to grant for such purpose the right for a term not exceeding twenty-five years to use the streets of said city; while still a further and third power was granted, that of purchasing works which might be erected in pursuance of such authorization. (Section 11, City Charter, Record, 2).

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 650-660.

The powers granted to erect and maintain water works, or to *authorize* the erection and maintenance of the same, are, it will be observed, in the *alternative*. Only one water supply for this city was clearly contemplated; that is, either one erected by the city, *or*, one erected by a person, association or corporation *authorized* by the city to do so, the right being reserved in the latter case to obtain ownership by condemnation and payment.

It is submitted, therefore, action under one power excludes action under the other.

Atlantic City Water Co. vs. Atlantic City,
37 N. J. Eq., 367.

The city, for prudential reasons—lack of funds, doubtless, as very clearly appears from the pleadings—did not choose to erect its own water works, but did “*authorize*” their erection and maintenance by the respondents.

GRANTS OF POWER IN CITY CHARTER.

In addition to the power granted the city in the two sections, 11 and 12, of the charter set out in the complaint (Record, 2), the said city was clothed with further specific power in Sections 3, 4, 7 and 10 of said city charter as follows: (Act Ty. Wash., approved Nov. 28, 1883):

“SEC. 3. The City of Walla Walla has power to assess, levy and collect taxes for general municipal purposes not to exceed one-half per centum per annum upon all property, both real and personal, within the city, which is by law taxable for territorial and county purposes, and to levy and collect special taxes as hereinafter provided; but all taxes for general and special municipal purposes shall not exceed in any year one and one-half per centum on the property assessed, provided, however, that the above limitations shall not apply to local assessments for assessment districts.

“SEC. 4. The City of Walla Walla shall have power to make regulations for the prevention of accidents by fire, to organize and establish fire

departments, and shall have control thereof and ordain rules for the government of the same; to provide fire engines and other apparatus *and a sufficient supply of water*, and to levy and collect special taxes for these purposes not to exceed in any year three-tenths of one per centum upon the taxable property within the city.

* * * * *

"SEC. 7. The City of Walla Walla has power to provide for the lighting of streets and furnishing the city with lights, and for the erection or construction of such works as may be necessary and convenient therefor, and has power to levy and collect for these objects a special tax not exceeding one-fifth of one per centum per annum upon the taxable property within the limits of the city for the benefit of such lights.

* * * * *

"SEC. 10. The City of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light *or water*, to any persons or associations of persons *for a term not exceeding twenty-five years.*"

In *New Orleans Gas Company vs. Louisiana Light Company*, *supra*, Mr. Justice Harlan says:

"Municipal corporations constitute a part of the civil government of the state, and their streets

are highways, which it is the province of government by appropriate means to render safe. To that end, the lighting of streets is a matter of which the public may assume control. * * * Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit of business open as of common right to all upon terms of equality; for the right to dig up streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the state or by the municipal government of that city acting under legislative authority; (Dillon's Municipal Corp., 3d Ed., Sec. 691; *State vs. Cincinnati Gas Co.*, 18 Ohio St., 262. See also *Boston vs. Richardson*, 13 Allen, 146). To the same effect is the decision of the Supreme Court of Louisiana in *Crescent City Gas Light Company vs. New Orleans Gas Light Company*, 27 La. Ann., 138, 147, in which it was said: 'The right to operate gas works and to illuminate a city is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets and lay down gas pipes, erect lamp posts, and carry on the business of lighting the streets and houses of the City of New Orleans without special authority from the sovereign. It is a franchise belonging to the state, and in the exercise of the police power the state could carry on the busi-

ness itself or select one of several agents to so do.'"

In pursuance of this charter, and clearly within the scope of the power granted, the City of Walla Walla, by its ordinance passed the council March 15, 1887, and approved by the mayor March 19, 1887, (Record, 3-5), and by its agreement in writing with respondent in pursuance thereof of date May 9, 1887, (Record, 6-8), contracted and agreed with respondent as follows:

THE CONTRACT.

First—That the complainant was authorized to lay and maintain all necessary water mains, pipe, connections and fittings, in all the highways, streets and alleys, for conducting water in the streets of the city, and to supply the city and its inhabitants with water, the complainant obligating itself to do so and to supply water for the use of the city in extinguishing fires, flushing sewers and all other municipal purposes, for a period of twenty-five years, and in consideration thereof the City of Walla Walla obligated itself to pay to said Walla Walla Water Company, complainant, quarter yearly, on the first days of July, October, January and April of each year, at the rate of \$1,500 per annum, for said period of twenty-five years, from and after the date of such contract, the first quarterly payment to be made on the first day of October, 1887.

Second—That during such period of twenty-five years, unless, and until such contract had been avoided by a court of competent jurisdiction for a substantial failure to furnish the supply of water as provided for in said contract, or a substantial failure on the part of the respondent to keep or perform its contract obligations, it, the City of Walla Walla, would "*not erect, maintain or become interested in any water works*" except the one provided for in such contract, save and except by "*condemning and paying for the water rights and works*" of respondent. (Record, 3-8).

POINT III.

This ordinance and writing are in specific terms a "*contract*." This contract, moreover, is one so clearly and plainly expressed that misinterpretation is quite impossible. It is not open to construction—it interprets itself. From its provisions it is clear that the company's works were the exclusive source of water supply contemplated by the contracting parties, unless, in the event of a substantial failure upon the part of the company to comply with its provisions, and the avoiding of the contract by a court of competent jurisdiction for such purpose, *or* in the event of condemnation of the company's works and payment to the company of their value by the city.

It is stipulated in the contract, it will be observed, among other things, that the water company shall extend their system of mains as fast as the population and growth of the town shall reasonably warrant (Record, 47), and so as "to give pressure from the reservoir of the greatest elevation in the time of fires" (Record, 4); and further, "in case of fires the city, through its officers and employes, shall have all reasonable and necessary control of the water company's water mains and reservoirs for the extinguishment thereof," and "for the purpose of drilling fire companies shall use such water as may be necessary therefor, * * * and shall also use such water as may be necessary and convenient in its engine houses and other city buildings, and to supply any and all city fire cisterns (Record, 4); and further, that the city shall, during the twenty-five years existence of such contract, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, not oftener than once each week." (Record, 4).

It is further stipulated in this contract as follows:

"That for all the purposes above enumerated, said Walla Walla Water Company will furnish

an ample supply of water for domestic purposes, including sprinkling lawns, and an ample supply of good, wholesome water, at reasonable rates, to consumers at all times during the said period of twenty-five years." (Record, 4-5).

Did any doubt remain from the provisions just quoted that it was clearly the intention of the contracting parties that the city should not become a competitor with the water company in supplying the city and its inhabitants with water, that doubt is entirely removed by the further provisions of the contract wherein it is stipulated as follows :

"This contract shall be voidable by the City of Walla Walla, so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the water company to keep or perform any agreement or contract on its part herein specified or this contract herein contained." (Record, 5).

Then follows the specific agreement to the effect that the city should not become such competitor, in the following words :

"And until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any water works, except the ones herein referred to, save as hereinafter specified." (Record, 5).

What is the exception specification that followed? It is simply one providing *in terms* for the condemnation of the water company's works, and payment of their value by the city, and reads as follows:

"Neither the existence of this contract nor the passage of ordinance number 270, shall be construed to be, or be, a waiver or relinquishment of any rights of the city to take, condemn and pay for the water rights and works of said company, or any company, at any time, and in case of such condemnation, the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company." (Record, 8).

Aside, however, from the *express stipulation* in the contract that the city would not enter into competition with the water company, the city is estopped from doing so. It is a rule equally good in law and in morals that where one party to a contract has the power to impair its obligation by doing a certain other act, such party must be held by the act of making the contract to have impliedly agreed to refrain from doing such act of impairment. The City of Walla Walla, therefore, having contracted with the water company, respondent herein, to furnish a supply of water for all the purposes of the city and its inhabitants, has the power to impair the obligation of such

contract and render it absolutely worthless, because no company can compete with the city by erecting water works of its own. Therefore, in equity and good morals it must be said the city by solemnly entering into such contract agreed impliedly not to erect works of its own to be operated in competition.

POINT IV.

THE CONTRACT IS NOT PREJUDICIAL, EITHER TO THE PUBLIC HEALTH, OR THE PUBLIC SAFETY.

It cannot be successfully contended that this contract with the water company was in any sense prejudicial, either to the public health or to the public safety, inasmuch as the city is not only not deprived or prevented from exercising any control over the matter of supplying the city with water, but by the further terms of the contract itself such right is for all purposes of the public health and the public safety *expressly reserved to the city*.

For instance, it is provided in the contract that all water mains, pipes, connections and fittings shall "be placed far enough under ground to constitute as little obstruction as practicable, and in such a manner as to do the least possible damage to the streets, and not more than twenty-five feet from the boundary line of the streets, and in all cases where ditches for such purposes

shall be dug in the streets, the same shall be left as near as possible in the same condition as before, and the ground removed in digging such ditches shall be well and firmly packed and tamped while being replaced." (Record, 7).

Adding still further, the contract provides as follows :

"That the said water company will hereafter lay all their mains of sufficient size to carry fire hydrants, and they will erect one stand pipe on each side of Mill creek at or below Sixth street so as to equalize and make available the pressure of the water in their reservoir as now constructed, and will extend their system of mains as fast as the population and growth of the town shall reasonably warrant. Mains on the north and south side of Mill street will be connected so as to give pressure from the reservoir of the greatest elevation in time of fire; the main on First street will be connected with the Sixth street main by mains through each alternate street from Birch to Main inclusive."

And still further the contract makes the following reservation to the city :

"The City of Walla Walla shall have the right to erect in a proper and workmanlike manner and maintain at its own expense, in such manner as to prevent leakage, as many fire hy-

drants on the mains of the water company as it shall see fit, not exceeding one (1) at each street intersection, and *in case of fire the city, through its officers and employes, shall have all reasonable and necessary control of the water company's water, mains and reservoir for the extinguishment thereof; and for the purpose of drilling fire companies may use such water as may be necessary therefor, not oftener than once in two weeks for each fire company, and the city may also use such water as may be necessary and convenient in and about its engine houses and other city buildings, and to supply any and all city fire cisterns.*" (Contract, Record, 7).

These several provisions, it will be seen, cover every point necessary to the protection of the public safety, the public convenience and the public health, and for the purpose of reaching every want of the city and its inhabitants in respect of a water supply for municipal purposes, and insofar as they are interested in an ample supply of good, wholesome water for every purpose connected with the wants of the city and its people, and which supply must furthermore be, by the *express terms* of the contract, furnished by the water company to the consumers "*at reasonable rates,*" at all times during said period of twenty-five years. (Contract, Record, 7).

The city can, therefore, exercise all necessary control over this contract, and over the water company, in order to secure the performance of

all these various stipulations without in any manner impairing the obligation of the contract; besides, a substantial failure on the part of the water company to perform any of these conditions, authorizes the city, not on its own motion by its own legislative action, but *through a court of competent jurisdiction, to avoid the contract.* (Record, 7-8).

POINT V.

The City of Walla Walla, by its ordinance and agreement, agreed that for the period of twenty-five years it would not compete with the company, but that if during that time it wished to own its own water works it would buy those of the company at a price to be fixed by arbitration.

This the city had ample specific power to do, not only in virtue of Section 11 city charter, as incorporated in the complaint (Record, 2), but also by the specific provision in Section 10 of such charter (Act approved November 28, 1883) which reads as follows:

"The City of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light *or water*, to any persons or associations *for a term not exceeding twenty-five years.*

POINT VI.

THE STIPULATION THAT THE CITY WOULD NOT
BECOME A COMPETITOR A REASONABLE ONE.

A provision that the city shall not maintain water works of its own for twenty-five years, unless by purchase of the company's works at a price fixed by arbitration, is not an unreasonable one and is therefore authorized. The city, under the general authority to authorize the construction of water works, especially, as in this case, when there is specific authority to make a contract for a period of twenty-five years, is authorized, it is submitted, to incorporate into its contract for water supply any reasonable provisions which it desires to adopt. Were this not the case such a law would in most cases prove ineffectual. Few, if any, could be found willing to risk the amounts of money necessary to construct water works if the city might at any time establish water works of its own, and, backed up by the city treasury, become a competitor.

The question whether the city has the right to authorize third parties to enter the field as competitors does not arise in this case. Whether the city could rightfully enter into a similar contract with third parties is an entirely different question from that now before the court, and so far as our claim in this suit is concerned it may be conceded the city might rightfully do this.

POINT VII.

A CONTRACT WITH A MUNICIPAL CORPORATION IS
WITHIN THE PROTECTION OF SECTION 10,
ARTICLE I, OF THE CONSTITUTION.

This contract being between a private corporation and a municipal corporation, is protected under the constitutional provision equally with a contract between individuals.

Chief Justice Marshall, in the case of *State of New Jersey vs. Wilson*, 7 Cranch., 166, said :

"The constitution of the United States declares that no state shall pass any law impairing the obligations of a contract. In the case of *Fletcher vs. Peck*, 6 Cranch, 83, it was decided by this court on solemn argument and much deliberation that this protection of the constitution extends to a contract to which a state is a party as well as to contracts between individuals."

POINT VIII.

THERE WAS A GOOD AND SUFFICIENT CONSIDERATION FOR THE CONTRACT.

The benefits the city expected to derive from its contract with the water company constituted a good and valid consideration to support it.

This court, in the case of the *Home of the Friendless vs. Rouse*, 8 Wallace, 437, said:

"There is no necessity for looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes a consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this court on this subject since the case of *Dartmouth College vs. Woodward*."

Home of the Friendless vs. Rouse, 8 Wallace, 437.

POINT IX.

The argument that the city by such a contract deprives itself of its legislative or governmental power does not apply, where, as in the present case, the city couples with its covenant not to erect water works a reservation of the right to buy the water works of the company at a fair price.

The city, by such a contract, is not in the slightest divested of its power to provide and maintain its own system of water works for the

use of the city. Upon the contrary such a right is expressly reserved by the contract. By the very terms of the contract the city could at any time, whenever it should determine to furnish water by means of works owned by itself, secure such works by purchase of respondent. The contract with the water company was something more than the ordinary exercise of the legislative function, while it clearly included the exercise of a legislative function, and hence the act becomes a *law*, it becomes also a *contract* which must be construed, protected and treated in all respects as though the city making it were divested of every attribute of sovereignty or power to legislate.

POINT X.

IT WAS NOT NECESSARY THE CONTRACT WITH THE WATER COMPANY SHOULD HAVE BEEN SUBMITTED TO A VOTE OF THE FREEHOLDERS.

Defendants, referring to the contract between plaintiff and defendant, aver in their answer as follows:

"We allege that the terms of said contract *was* (were) not before the same was entered into, or at any time, or at all, submitted to a vote of the taxpayers of the said city at a special elec-

tion called by the city council therefor, nor was (were) the same submitted to a vote of the taxpayers at any time, or at all." (Record, 22.)

The conclusive answer to this is that there was no provision of law requiring this to be done. It will be observed by an inspection of Section 11 of the city charter (Record, 2) that two separate and distinct specific powers are conferred upon the City of Walla Walla in the matter of providing for a water supply for the city. *First*, the city itself is empowered to erect and maintain water works; and, *Second*, it is empowered "*to authorize*" the erection of the same (Record, 2). It is further provided in the same section that when the *first* power is exercised by the city erecting its own works, that then the proposition shall be submitted to a vote of the freeholders of the city. This proposition is in these words: "But no water works *shall be erected by the city* until a majority of the voters who shall be those only who are freeholders in the city, or pay a property tax therein on not less than five hundred dollars' worth of property, shall, at a general or special election, vote for the same. Such proposition shall be formulated and submitted not less than thirty days before election."

There is, therefore, no such requirement when the city "*authorizes* the erection of such works." It was not essential to its validity, therefore, that

this contract with the water company "*authorizing* them to construct and maintain water works" should have been submitted to a vote of the freeholders of the city.

It must be conceded, therefore, that the contract set out in the complaint is in all respects valid, and entitled to the protection of Section 10, Article 1, of the constitution against any attempt at an impairment of its obligation upon the part of the state, or, which is the same thing, the City of Walla Walla.

POINT XI.

THE ORDINANCE OF THE CITY OF WALLA WALLA APPROVED JUNE 20, 1893, AND PROCEEDINGS THEREUNDER (Record, 10-13) CONSTITUTE A *Law* WITHIN THE MEANING OF SECTION 10, ARTICLE 1, OF THE CONSTITUTION.

The ordinance of the City of Walla Walla passed the council June 20, 1893, and approved by the mayor June 20, 1893, (Record, 10-13), and the vote of the city in pursuance thereof (Record, 13) constitute a *law* within the meaning of the provision, "No state shall pass any law impairing the obligation of contracts," Article 1, Section 10, of the constitution of the United States.

Saginaw Gas Co., vs. Saginaw, 28 Fed. Rep., 29.

Citizens Street Railway vs. Memphis, 53 Fed. Rep., 715.

Citizens Street Railway vs. City Railway Co., 56 Fed. Rep., 746.

Santa Anna Co. vs. Buenaventura, 56 Fed. Rep., 339.

Capital City Gas Co. vs. Des Moines, 72 Fed. Rep., 818.

Baltimore Trust Co. vs. Baltimore, 64 Fed. Rep., 153.

Wright vs. Nagle, 101 U. S., 791.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258-266.

Bacon vs. Texas, 163 U. S., 207.

New Orleans Water Works Co. vs. New Orleans, 164 U. S., 471.

If a municipal ordinance is in scope and character the exercise of a power to legislate delegated to such municipality by the state, it is a *law* of the state within the meaning of the constitutional provision prohibiting a state from

passing any law impairing the obligation of contracts.

Wright vs. Nagle, 101 U. S., 791.

Williams vs. Bruffy, 96 U. S., 176, 183.

New Orleans Water Works vs. Louisiana Sugar Co., 125 U. S., 18-31.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 258.

Bacon vs. Texas, 163 U. S., 207.

New Orleans Water Works Co. vs. New Orleans, 164 U. S., 471.

Baltimore Trust Co. vs. Baltimore, 64 Fed. Rep., 153.

In *Bacon vs. Texas*, 163 U. S., 207, Mr. Justice Peckham says:

"As stated in the case reported in 125 U. S., *supra*, (*New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*), it is not necessary that the law of a state, in order to come within this constitutional prohibition, should be either within the form of a statute enacted by the legislature in the ordinary course of legislation, or in the

form of a constitution established by the people of the state as their fundamental law. A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the constitution of the United States."

Again, in *New Orleans Water Works Co. vs. New Orleans*, 164 U. S., 471, Mr. Justice Harlan says :

"In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the state, and are to be respected by all * * *. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere and by injunction prevent the execution of such ordinance."

In the case 164 U. S., *supra*, this court declined to attempt to control the discretion of the New

Orleans city council in advance of legislative action by such council, holding it would be time enough to interfere after action to restrain by injunction the execution of an unconstitutional ordinance.

That the passage by a city of an ordinance, and a vote of the city in accordance with the power conferred in the municipal charter providing for the erection of water works, is "an exercise of legislative power," must, in view of repeated decisions, be considered as removed from all controversy. This court, speaking by Mr. Justice Harlan, in *New Orleans Water Works Company, vs. Rivers*, 115 U. S., 674-681, says:

"The right to dig up and use streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water, is a franchise belonging to the state, which she could grant such persons or corporations, and upon such terms as she deemed best for the public interests."

POINT XII.

JURISDICTION.

There can be no question that the circuit court had jurisdiction of this case. This is clear from what has already been said. It may be further added, however, that the right for the protection of which the respondent has invoked

the process of the court, is one secured to it, as claimed by the respondent, by the constitution of the United States, and the thing complained of is a *law* alleged to be void as violating the same constitution.

Does the constitution of the United States, Section 10, Article 1, protect the complainant against the acts complained of?

No question could more clearly show a "matter in dispute arising under the constitution of the United States." In such a dispute original jurisdiction is given the Circuit Courts of the United States by the act of March 3, 1875.

The very question involved, is as to the construction, application, force and effect of this section of the federal constitution.

This court, in *Railroad Company vs. Mississippi*, 102 U. S., 141, said:

"That a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either; that cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right, or privilege, or claim, or protection or defense of the party, in whole or in part, by whom

they are asserted; that, except in the cases of which this court is given, by the constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form or both, as the wisdom of congress may direct; and lastly that it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit court jurisdiction of that cause, although other questions of fact or of law may be involved in it."

R. R. Co. vs. Miss., 102 U. S. 141.

That the circuit court had jurisdiction, therefore, of this case, does not seem to admit of a doubt, and as there is no adequate remedy at law, injunction is the proper and appropriate remedy.

Osborn vs. United States Bank, 9 Wheaton,
738.

Crescent City Live Stock Co. vs. Butchers Union, 9 Fed. Rep., 743.

*New Orleans Water Works vs. St. D.
Water Works*, 14 Fed. Rep., 194.

B. & B. vs. Allen, 17 Fed. Rep., 171.

Parsons vs. Mayre, 23 Fed. Rep., 113.

Citizens St. Ry. Co. vs. Memphis, 53 Fed.
Rep., 715.

Barnes vs. Konegay, 62 Fed. Rep., 671.

Each of the foregoing cases involved the construction and application of Article 1, Section 10, of the constitution of the United States.

The general doctrine announced by Chief Justice Marshall in the leading case of *Osburn vs. the United States Bank*, in 9 Wheaton, 738, "That the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the constitution, and would do irreparable damage and injury to him," and which has been repeatedly affirmed by this court, notably in the case of *Pennoyer vs. McCounoughy*, 140 U. S., 1,

and in *Scott vs. Donald*, 165 U. S., 114, is applicable to the case at bar.

It is true in this case, no question as to the state being a party, therefore no question under the eleventh amendment to the constitution is involved; still it is applicable as ascertaining the general rule that the United States courts will by injunction restrain the execution of a law which is unconstitutional by reason of the fact that its execution would impair the obligation of a contract.

It is conceded that if it were absolutely certain that the City of Walla Walla had the power, at any time, on its own motion to arbitrarily repeal the ordinance authorizing the water company to construct water works, and abrogate its contract with the company, then the circuit court would have no jurisdiction of this case, as in that event no federal question could be presented, but one only of the law of the state apart from its connection with the other. But such, it is respectfully submitted, is not the case. The city by the passage of this ordinance and by its agreement with the water company becomes a party to a solemn contract which it cannot, at will, set aside without impairing its obligation, a thing, the state directly, or through its municipality, cannot do.

POINT XIII.

NO RESERVATION IN THE CHARTER TO ALTER, AMEND OR REPEAL, AND NONE, EXCEPT A QUALIFIED ONE, IN THE ORDINANCE AND AGREEMENT.

It must be observed that no right to alter, amend or repeal the city charter under which this contract was made was reserved in the charter, neither is there any reservation of this character in the ordinance authorizing the contract (Record, 3-5), nor in the agreement made in pursuance thereof (Record, 6-8), except a qualified one in such ordinance and agreement. This qualified reservation in the ordinance is in the following words:

"And this contract shall be voidable by the City of Walla Walla, so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part, herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the City of Walla Walla shall not erect, maintain or become interested in any water works, except the ones herein referred to, save as hereinafter specified." (Record, 5).

Also the following in said ordinance:

"Neither the existence of said contract nor the passage of this ordinance shall be construed to be, or be, a waiver of, or relinquishment of, any right of the city to take, condemn and pay for the water rights and works of said or any company at any time; and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company." (Record, 5).

These reservations are also in *hæc verbæ* in the agreement with the water company. (Record, 7-8).

It is not contended that there has ever been any judgment of any court of competent jurisdiction avoiding said contract, either for the reasons stated in such reservation or any other, nor has there ever been any attempt upon the part of the city to obtain such judgment. It can not be said, therefore, that any right upon the part of the city to arbitrarily set aside this contract, to alter, amend or repeal it, was in any manner incorporated into, or became a part of, the contract itself. The contract, therefore is clearly brought within the protection of the federal constitution.

Infinitely stronger in this case is the reason why such a contract should be protected by the federal constitution, against the impairment of its

obligation by a state, than in the case of exemption from taxation of particular parcels of property, or of property of particular persons or corporations, in which cases it has been frequently held by this court such exemption became a part of the contract, and it is thus brought within the constitutional protection and will be protected, except there be reservation in the charter or grant or whatever it may be, of the right to alter, amend or repeal.

New Jersey vs. Wilson, 7 Cranch., 164.

Jefferson Bank vs. Skelly, 1 Black, 436.

Home of the Friendless vs. Rouse, 8 Wallace, 430.

Wilmington Railroad vs. Reed, 13 Wallace, 264.

Barnes vs. Konegay, 62 Fed. Rep., 671.

THE RHODE ISLAND CASE.

The case of *Seaman's Friend Society, et. al. vs. Town of Westerly, et. al.*, in the Circuit Court of the United States for the District of Rhode Island, not yet reported, is one very similar to that now under discussion. In that case the charter

authorized the town to construct water works and also to contract for a water supply. Judge Carpenter, in his opinion, granting a preliminary injunction, said:

“On the other hand, to refuse relief here would be to permit the destruction of the whole contract. There must be some rights which are entitled to be protected under a contract admitted and found to be valid. Turning, then, to the substantive question which it seems to me must be here decided, the question is whether the contract here in dispute contains an implicit reservation founded on the then existing state law of the right of the town at pleasure to construct water works. The law gives power to construct water works, and also to contract for a water supply, and, as incidental to such contract, to confer certain rights and exemptions on the contractors. Does this leave it competent for the town to make a contract with this corporation, and afterwards, without any default alleged on the part of the corporation, and in derogation of the terms of the contract, to construct other works? The question is not whether the town may grant a franchise to be exclusively exercised by the company for a term of years, without regard to its ability or willingness to furnish an adequate supply of suitable water; but the question is, rather, whether the town has not by its own act, under *one* branch of the law, limited its power to act under the *other* branch of the act. Answering

this question in the affirmative, I find that the town is making the attempt to exceed the limits so set."

Where a city contracts in its corporate capacity through its officers, acting by authority of an ordinance of the common council, the city is not at liberty to annul the contract by an ordinance so made repealing the contract. Having made the latter, the city is bound by it.

State vs. Heath, 30 La. Ann., 1721.

It has no more rights in that respect than an individual.

Hewitt vs. Town of Alton, 7 N. H., 257.

West Saving Society vs. Philadelphia, 31 Pa. St., 175.

Prather vs. New Orleans, 24 La., 41.

Davenport Gas Co. as. Davenport, 13 Iowa, 233.

The following arose under Article 1, Section 8 of the constitution of the United States, reserv-

ing to congress the power to regulate commerce with foreign nations and among the several states, and in which injunctions were issued :

U. S. Express vs. Hemmingway 39 Fed. Rep., 60.

Am. Fertilizing Co. vs. Board of Ag., 43 Fed. Rep., 609.

Spellman vs. New Orleans, 45 Fed. Rep., 3.

Cuban Steamboat Co. vs. Fitzpatrick, 66 Fed. Rep., 63.

Donald vs. Scott, 67 Fed. Rep., 854.

The following cases of restraint by injunction arose under other provisions of the constitution of the United States :

Claybrook vs. Owensboro, 16 Fed. Rep., 297.

Hospes vs. O'Brien, 24 Fed. Rep., 145.

Stillman vs. Hudson River Bridge Co., 4 Batch., 74.

Baird vs. Short Line Railway Co., 6 Batch., 276.

In the case of *Lehigh Water Company vs. Easton*, 121 U. S., 388, no contract was then existing between the town and the water company, hence, there was nothing to prevent the town from erecting public water works in competition. A number of like cases may be found in the books.

SECOND.

DID THE CONTRACT WITH THE WATER COMPANY CREATE AN INDEBTEDNESS, WHICH, WITH OTHER AND EXISTING INDEBTEDNESS, EXCEEDED \$50,000, CONTRARY TO SECTION 105 OF THE CITY CHARTER?

As has been already shown, in addition to the powers conferred on the City of Walla Walla by Sections 11 and 12 of its charter (Complaint, Recork, 2), additional powers relating to water, light, taxation and revenue were granted by Sections 3, 4, 6 and 10 of the same charter as cited, *supra*, page — of this brief.

Before considering these in this connection, however, the attention of the court is attracted to the state of the pleadings as bearing upon this question of illegal indebtedness.

THE PLEADINGS.

POINT I.

Indeed, it is a very serious question whether there are in the pleadings averments sufficient to enable the plaintiffs in error to attack the contract on the ground that it created an indebtedness beyond the limit fixed by the charter. The only averments on the subject are the following in the complaint: "That the said city at said time (the date of the contract May 9, 1887) was indebted in a sum exceeding \$16,000, and that in and by Section 105 of its charter it was forbidden to create an indebtedness of more than \$50,000," (Record, 3). While the answer admits this allegation in terms, but makes no averment or claim whatever that the execution of this contract created an indebtedness beyond the limit fixed by the charter (Record, 21-22), but on the contrary, in its further answer, avers one reason only for such contract being *ultra vires*, as follows. The answer in attacking the contract says: "We deny that the same was duly or regularly made or entered into, and we deny that said contract has at any time been or is now, or ever was, a valid or binding contract between said complainant and the said City of Walla Walla, and allege that the same is *ultra vires* and invalid. We allege that the terms of said con-

tract were not, before the same was entered into, or at any time, or at all, submitted to a vote of the taxpayers of said city at a special election called by the city council therefor, nor was the same submitted to a vote of the taxpayers at any time or at all." (Record, 22-23).

It will thus be seen that the failure to submit the terms of the contract to a vote of the taxpayers is the *only* ground upon which it is claimed such contract is *ultra vires*.

It is respectfully submitted, therefore, the pleadings do not entitle plaintiffs in error to insist the contract is *ultra vires* for or on account of an excess of indebtedness.

POINT II.

THE POWERS OF THE CITY AS TO TAXATION AND REVENUE.

Sec. 3 of the act incorporating the City of Walla Walla, which took effect January 1, 1884, provides as follows:

"The City of Walla Walla has power to assess, levy and collect taxes for general municipal purposes, not to exceed one-half per centum per annum, upon all property, both real and personal, within the city which is by law taxable for territorial and county purposes, and to levy and collect special taxes as hereinafter provided; but

all taxes for general and special municipal purposes shall not exceed in any year one and one-half per centum on the property assessed,"

While by Sec. 4 it is provided: "The City of Walla Walla shall have power to make regulations for the prevention of accidents by fire, to organize and establish fire departments, and shall have control thereof, and ordain rules for the government of the same. To provide fire engines and other apparatus and a sufficient supply of water, and to levy and collect special taxes for these purposes, not to exceed in any year three-tenths of one per centum upon the taxable property within the city."

Section 10 provides as follows: "The City of Walla Walla is hereby authorized to grant the right to use the streets of said city for the purpose of laying gas and other pipes, intended to furnish the inhabitants of said city with light or water, to any person or association of persons, for a term not exceeding twenty-five years."

POINT III.

Does the contract to pay for supplying the city with water for municipal purposes, in quarterly installments as the water is furnished, at the rate of \$1500 per annum for twenty-five years, create an indebtedness for the whole \$37,-

500 that *may possibly* ultimately become payable, within the meaning of Section 105 of the city charter? It is respectfully insisted that it does not. The clause of the city charter is as follows:

"SEC. 105. The limit of indebtedness of the City of Walla Walla is hereby fixed at \$50,000." (Record, 3).

There is nothing in the act organizing the Territory of Washington requiring the legislature of the territory to limit the amount of indebtedness of a municipal corporation.

It is not claimed, I believe, nor indeed could it be, that this contract in any manner contravenes the act of Congress of July 10, 1886, prohibiting municipal corporations from ever becoming indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum of the value of the taxable property within such corporation, from the fact that it appears from the pleadings that the taxable value of the property of Walla Walla is more than \$3,000,000 (Complaint, Record, 14), four per cent of which would be \$120,000. This averment is admitted in the answer. (Answer, Record, 25).

Courts in construing a statute should lean towards that interpretation which will further the object of the legislation, rather than toward one based solely on artificial rules. In this case one

great purpose of the city charter is to enable the city to provide the municipality with water and light. Each of these involves large annual expenditures, and the very nature of the business requires that the contract for such supply shall extend over a great number of years. The provision, therefore, limiting the indebtedness of the city, must be construed in the light of these other provisions, under which the ordinary business of the city can only be carried forward.

Section 105 of the city charter of Walla Walla must be construed in connection with all of the other provisions of the charter, and in such manner as to give it a sensible construction in the light of such other provisions and so as to avoid absurd consequences.

In *U. S. vs. Kerby*, 7 Wall., 483, this court, speaking through Justice Field, said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will therefore be presumed that the legislature intended exceptions to its language which would avoid results of this character."

And so in *Pollard vs. Bailey*, 20 Wall., 525, this court, speaking through Chief Justice Waite, said:

"The intention of the legislature, when properly ascertained, must govern in the construction of every statute. For such purposes the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

So far as I have been able to examine the decisions of this court, the precise question presented in this case as to what constitutes a municipal indebtedness under a similar provision to that of the Walla Walla charter, has never been decided. In the state courts, however, and also in the United States circuit courts there have been many cases arising under different provisions in state constitutions and in city charters limiting state, county and municipal indebtedness, in which questions almost identical with that presented here have been determined. That these authorities are to some extent conflicting is conceded, but that the great weight of authority, as well as the better reason sustain the views for which I am contending, I confidently insist.

POINT IV.

AUTHORITIES.

Mr. Dillon, in his work on Municipal Corporations, Sec. 88, in discussing this very question, says:

"When a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limit of its current revenues, and such special taxes as it may legally and in good intent levy, therefore such contract does not constitute 'the incurring of indebtedness' within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts."

In a lengthy note in the forty-fourth American State Reports, pages 229-243, in which the different phases of this question are discussed at length and authorities collated and cited, there will be found the following summing up which fully sustains the view for which we are contending:

"If a contract is made for the erection of water works, or for any other improvement, and the time of payment is postponed to some date or dates in the future, we apprehend that there is no conflict of decision upon the subject and that the sums to become due in the future must all be taken into consideration in estimating the amount of the existing indebtedness of the municipality; *Culbertson vs. City of Fulton*, 127, Ill., 30; but where the contract or ordinance is one intended to provide for the furnishing of a municipality with water to be used for public purposes, or with lights for the streets, or other public places, and

payment is to be made for such water or lights from year to year, this is but a mode of providing for the necessary current expenses of the municipal government; and while it is true the municipality has no discretion not to become liable from year to year for the amount which it has agreed to pay, *yet the almost overwhelming weight of authority is that it is not to be regarded as indebtedness within the meaning of these constitutional or statutory limitations, except for the amount which has actually fallen due under the contract or ordinance*, and that it must, therefore, be sustained, although the amount which will ultimately become due under it may greatly exceed the limit of indebtedness which the municipality is authorized to incur. *East St. Louis vs. East St. Louis L. Etc. Co.*, 98 Ill., 415; 38 Am. Rep., 97; *Crowder vs. Sullivan*, 128 Ind., 486; *Valparaiso vs. Gardner*, 97 Ind., 1; 49 Am. Reps., 417; *Smith vs. Dedham*, 144 Mass., 177; *Grant vs. City of Davenport*, 36 Ia., 396; *East St. Louis Gas Lighting Co. vs. East St. Louis*, 45 Ill. App., 597; *Lott vs. City of Waycross*, 84 Ga., 681; *Merrill Railway Light Company vs. Merrill*, 80 Wis., 358."

44 American Reports, 240.

In the case *The Merrill Railway and Lighting Company vs. The City of Merrill*, 80 Wis., 358, which was a case wherein the city had agreed to pay to an electric lighting company \$2,050 per

year for eight years, in quarterly installments, for the lighting of its streets and the city hall, there being a provision in the city charter to the effect that "No tax for general city purposes shall be levied in any year exceeding two per cent. of the assessed valuation of the taxable property of the city, and that the city shall have no power to borrow money or contract any debt which can not be paid out of the levy of the fiscal year which shall commence," etc., the court said:

"The presumption must be that the city is able to meet its obligations and to pay its just debts, nothing appearing to the contrary. It is true the contract is to continue for eight years, but the city will have only to provide for and pay a debt of \$2,050 during any fiscal year. We can not presume that this sum will exceed the amount the city will realize by the two per cent. tax, or that the indebtedness incurred each year on the contract will go beyond the revenue of such fiscal year. Therefore, we are unable to sustain the position of the learned counsel for the city that the common council had no power under its charter to make the contract for lighting its streets and public buildings."

The Merrill Railway and Lighting Co. vs. The City of Merrill, 80 Wis., 360.

The above case was decided on a demurrer to the complaint. It did not appear from the com-

plaint in that case that the annual revenues would be sufficient within the limitation of the charter to meet all indebtedness, including that of the contract in question. The court held, however, that there could be no presumption to the contrary indulged in.

The case now before this court is infinitely stronger in this respect, from the fact that it clearly appears from the pleadings that the annual revenues of the city of Walla Walla are largely in excess of its ordinary expenses, including also the \$1,500 to be paid annually under the contract in question.

A public statute of the state of Massachusetts provided as follows:

"SEC. 6. That towns may incur debts for temporary loans, in anticipation of the taxes of the year in which debts are incurred, and the year next ensuing, and expressly made payable therefrom by vote of the town."

Section 7 of the act provided as follows:

"SEC. 7. That other debts than those mentioned in the preceding section shall be incurred only by a vote of two-thirds of the voters present and voting at a town meeting."

The town of Dedham in Massachusetts voted to authorize its selectmen to make a contract with a water company to supply the town with water

for fire and other purposes for a term of years, at a certain sum, to be paid annually. This proceeding did not receive the approval of a vote of two-thirds of the voters present and voting. It was held, however, by the supreme court of that state in the case of *Smith et al., vs. The Town of Dedham*, 10 N. E. Rep., 782, that said contract was valid and not in violation of the above statute. The Court, Gardner J., in passing upon the question said:

"The contract which the selectmen are authorized to make is one which we assume is to be paid annually among the other current expenses of the town, the payments to be made out of the moneys annually granted by the town and raised by taxation. It is in effect a cash transaction, where the payments are made *pari passu* with the accumulation of the yearly service which determines the amount to be paid. *Grant vs. Davenport*, 36 Iowa, 396. It is like the other ordinary expenses of the town within the limit of its annual current expenses. The town of Dedham, by its vote, *did not incur a debt* within the fair meaning of Pub. St., C. 29, Sec. 1. A majority of the court is of the opinion that the statute was not intended to apply to contracts made for the current expenses of the town, and payable out of the current revenues of the several years in which the water company is to furnish water to the town. *Lacock vs. Baton Rouge*, 35 La. Ann., 475."

Smith vs. Town of Dedham, 144 Mass., 177.
10 N. E. Rep., 782.

No obligations imposed by a contract to pay money becomes a debt until the money is payable. *Weston vs. Syracuse*, 110 N. Y., 110; *Garrison vs. Howe*, Id., 458. Such a contract would consist of dependent promises, of which the performance would be severable and divisible, and no debt would be created. *Willington vs. West Boylston*, 4 Pick., 101; *Badger vs. Titcomb*, 15 Pick., 409; *Knight vs. New England Worsted Co.*, 2 Cuch., 271, 290; *Oviatt vs. Hughes*, 41 Barb., 541. Nothing would be payable except upon a contingency, and an obligation depending upon a contingency does not create a debt. *People vs. Arguello*, 37 Cal., 524; *Wood vs. Partridge*, 11 Mass., 488, 493. It was so held in the state of Massachusetts in cases arising under the Trustee process, (*Wentworth vs. Whittemore*, 1 Mass., 471, 473; *Thorndyke vs. De Wolf*, 6 Pick., 120; *Meacham vs. McCorbitt*, 2 Metc., 352), and also in cases involving liability of stockholders and officers for corporate debts (*Boardman vs. Osborn*, 23 Pick., 295). So under insolvent laws where the term "debts" is used in its broadest sense, and in other cases. *Woods vs. Partridge*, *ubi supra*; *Davis vs. Ham*, 3 Mass., 33; *Child vs. Boston & Fairhaven Iron Works*, 137 Mass., 516, 520; *Bent vs. Hubbardson*, 138 Mass., 99, 100; *Deane vs. Caldwell*, 127 Mass., 242.

In *Saleno vs. Neosho*, 127 Missouri, 627 (48 Am. St. Rep., 653) it was held that "contracts for the annual supply of municipalities with such necessities as light and water, and contracts for the payment therefor, do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, within the meaning of the constitutional provision limiting the yearly indebtedness which may be incurred by the city."

In the case *supra*, *Saleno vs. Neosho*, the court, after collecting the authorities supposed to hold to the contrary view, says (page 660):

"It is worthy of remark that, in each one of the cases cited, the constitutional limit of indebtedness had been reached before the contract had been made, except *Niles Water Works vs. Niles*, 59 Mich., 311, and in that case one of the members of the court, Sherwood, J., dissented. No such claim is made as to the City of Neosho."

The court, proceeding further in the case, *supra*, says:

"Among the authorities which hold to the contrary rule, and that the word 'indebted,' as used in state constitutions, as in Section 12, Article 10 of the constitution of Missouri, does not include contracts for the annual supply of municipalities with such necessities as light and water and of similar character, and contracts for

the payment therefor do not create a debt for the aggregate amount which may become due upon a compliance with the terms of the contract, may be cited the following: *Dively vs. Cedar Falls*, 27 Iowa, 227; *Grant vs. Davenport*, 36 Iowa, 401; *Budd vs. Budd*, 59 Fed. Rep., 957; *State vs. McCauley*, 15 Cal., 429; *Koppikus vs. State Capitol Commrs.*, 16 Cal., 248; *People vs. Pacheco*, 27 Cal., 207; *Carlyle Water, Etc. Co. vs. Carlyle*, 31 Ill. App., 339; *City of Carlyle vs. Carlyle Water Etc. Co.*, 140 Ill., 445; *Crowder vs. Sullivan*, 128 Ind., 486; *Valparaiso vs. Gardner*, 97 Ind., 1; 49 Am. Rep., 416; *Weston vs. Syracuse*, 17 N. Y., 110; *Utica Water Works Co. vs. Utica*, 31 Hun., 430; *Smith vs. Dedham*, 144 Mass., 179. See, also, 1 Dillon on Municipal Corporations, 4th Ed., Sec. 135. Our conclusion is that the weight of authority is adverse to the contention of defendant and is in accord with the spirit and meaning of our constitution as we understand it, and as we think also comports with better reason."

Saleno vs. City of Neosho, 127 Missouri, 627.

All the above cases, also the case of the *Appeal of the City of Erie*, 91 Pa. State Rep., 403, referred to later in this brief, are cited with approval in *Budd et al vs. Budd et al*, by the United States Circuit Court for the Western District of Missouri, 59 Federal Reporter, 735. This is a late case, decided February 6, 1894.

The provision of the constitution of the State of Missouri adopted in 1865, and which was under consideration in the case *supra*, is as follows :

"SECTION 14, ARTICLE II. The Joint Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

In the case of the *Appeal of the City of Erie*, 91 Penn. St. Rep., 403, it was held :

"If the contracts or engagements of municipal corporations do not overreach their current revenues, no objection can lawfully be made to them, however great the indebtedness of such municipality may be, for in such cases their engagements do not extend beyond their present means of payment, and so *no debt is created*."

In the case of *John Weston vs. The City of Syracuse*, 17 N. Y., 110, it was held by the court of appeals that the obligation of a contract to render service does not become a debt within the sense of the prohibitions of the charter placing a limit upon the amount of indebtedness, until money becomes payable according to its terms.

Judge Denio, in delivering the opinion in the above case, said :

"But the compensation to this contractor was not a debt within the sense of this provision, until the service was performed and the contractor was entitled to be paid. It was no doubt an obligation, in some sense, from the time the contract was entered into, but it was not a debt in the popular sense, and certainly not one to which the correlative term payment could with propriety be applied, and it is such debts only which the provision speaks of."

In *State vs. McCauley*, 15 California, 456, the court, speaking through Justice Field, held that a contract for the payment of \$10,000 per month to one Estill on his lease of the prison and convicts, did not create a debt within the meaning of the constitutional provision of that state limiting indebtedness, except as the services were each month performed. The only difference between that case and the one at bar was that in the former an appropriation was made at the time of the making of the contract.

Chief Justice Field, at page 455 of the case, *supra*, said :

"Until the services are rendered there can be no debt on the part of the state." And again :
 "To support the convicts is as much the duty of

the state as to provide for the salaries of her officers, and constitutes one of the ordinary sources of the state's expenses; and authorizing a contract to keep the prisoners at a fixed price, the payment on the services being future acts, is no more in conflict with the constitution than the law fixing the salaries of the judges and other officers of the government, and providing for their payment through the treasury of the state. The eighth article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, *within her revenues.*"

The same doctrine was approved in the case of *People vs. Pacheco*, 27 Cal., 176.

The constitutional amendment being an amendment to the constitution of the State of Indiana, adopted in 1881, reads as follows:

"No political or municipal corporation in this state shall ever become indebted in any manner or for any purpose to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for a state and county tax previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void."

The supreme court of the State of Indiana in the *City of Valparaiso vs. Gardner*, 97 Ind., 1; 49 Am. Reps., 417, in discussing the question as to whether a contract for a necessary supply of water for twenty years, at an expense in the aggregate beyond the limit of indebtedness which the city could ordinarily incur, payments to be made annually as the water is furnished, and not exceeding the constitutional limit of indebtedness in any way, said:

"The question is a grave one, and not entirely without difficulty. If we hold that the contract to pay an annual water rent of \$6,000 during a period of twenty years creates a debt for the aggregate sum of \$120,000, and is a debt within the prohibition embodied in the constitution, we should lay down a principle that would, in a great majority of instances put an end to municipal government. If it be true that an agreement to pay a given sum each year, for a long period of years, constitutes a debt for the aggregate sum resulting from adding together all the yearly installments, then it is extremely doubtful whether there is a city in the state that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know as

a matter of general knowledge that water works and gas works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities, or to leave them without water or light. Nor are we to presume that the electors were ignorant of the existence, condition and necessities of our great towns and cities. On the contrary, we are to presume that these things were known to the electors, and that they intended to foster the best interests of these instrumentalities of local government * * * *. We agree that if it be found that the language used is clear and explicit, we must give it effect, no matter how disastrous the consequences may be. While it is our duty to yield to the words of the constitution, still in determining what meaning they were intended to have, it is proper to consider the circumstances under which the provision was adopted and the object it was intended to accomplish. Cooley, Const., 5th Ed., 78, 79."

The court, proceeding further in the case of *Valparaiso vs. Gardner, supra*, and after a thorough review of the cases bearing upon the question, says :

"Our leading purpose is, therefore, to ascertain what meaning the authors of the constitution intended the word 'indebted' to have, and we address ourselves to its accomplishment. It is clear that if the city should fail to perform its contract, the recovery would be for damages for a breach of contract and not the contract rate of compensation, and, therefore, it can not be true that the whole of the compensation is certainly demandable by the corporation with which it contracts. It may be that but a small part of even one year's compensation can be recovered. On the other hand, the failure of the water company to perform may put an end to the contract, and that would, of course, terminate all liability of the municipal corporation. There could be no action maintained against the city for the recovery of compensation under the contract without evidence that the water had been furnished, and this proves that there is no indebtedness until the water has been supplied in accordance with the terms of the contract. The effect of the proposed contract is that the city shall be liable for water as it is furnished, and not before. It is not until after the water has been furnished that there can be justly said to be a debt, for while there might be a liability for damages in case of a breach on

the part of the city, there is certainly none under the contract until the city has received that for which it contracted. If it can pay this indebtedness when it comes into existence without exceeding the constitutional limitation, then there is no violation of the letter, and surely none of the spirit, of the constitution. We are careful to say 'when the debt comes into existence,' and not to say 'when it becomes due,' for between these things there is an essential difference. The object to be accomplished by the amendment, the condition and necessities of our municipalities, as known to the authors of the amendment (the court is referring to the amendment to the constitution limiting indebtedness), and the just force of the language employed, authorize us to conclude that the inhibition of the constitution does not apply to contracts for water to be paid for as the water is furnished, provided it is shown that the contract price can be paid from the current revenues as the water is furnished, and without increasing the corporate indebtedness beyond the constitutional limit. The adjudged cases sustain our conclusion."

City of Valparaiso vs. Gardner, 97 Ind., 1.

Crowder vs. Town of Sullivan, 128 Ind., 487.

East St. Louis vs. East St. Louis, Etc. Co.,
98 Ill., 415.

Dively vs. City Cedar Falls, 27 Ill., 227.

First Dillon Municipal Corporation, 3d Ed.,
Sec. 135.

Grant vs. City of Davenport, 36 Ia., 396.

State vs. McCauley, 15 Cal., 429.

People vs. Pacheco, 27 Cal., 175.

Again in *Crowder vs. Town of Sullivan*, 128
Indiana, 487, (28 N. E. Rep., 94) the court said:

"When a municipal corporation contracts for a usual and a necessary thing, such as water or light, and agrees to pay for it annually as furnished, the contract does not create an indebtedness for the aggregate sum of all the yearly installments, since the debt for each year does not come into existence until the compensation for each year has been earned. It may be true that the contract creates an obligation, for a breach of which an action for damages will lie, but it does not create a right of action for the unearned compensation. The earning of each year's compensation is essential to the existence of a debt. If municipal corporations cannot contract for a long period of time for such things as light or water the result would be disastrous; for it is a matter of common knowledge that it requires a

large outlay of money to provide machinery and appliances for supplying towns and cities with light and water, and that no one will incur the necessary expense for such machinery and appliances if only short periods are allowed to be provided for by contract. The courts cannot presume that the legislature meant to so cripple the municipalities of the state as to prevent them from securing light upon reasonable terms and in the ordinary mode in which such a thing as electric light or gas is obtained, but it is not necessary to discuss this point at greater length, for we regard the law upon it as settled by the adjudged cases. *City of Valpariso vs. Gardner*, 97 Ind., 1, and authorities cited; *City of New Albany vs. McCulloch*, (Sup. Ct. Ind.) 26 N. E. Rep., 1074; *East St. Louis vs. East St. Louis, Etc. Co.*, 98 Ill., 415; *Appeal of City of Erie*, 91 Pa. St., 398; *Grant vs. Davenport*, 36 Iowa, 396; 1 Dill. Mun. Corp. (4th Ed.), Sec. 135."

Crowder et. al. vs. Town of Sullivan, (Supreme Court of Indiana, June 13, 1891), 28 N. E. Rep., 94.

The only point decided in the case of *Sackett vs. City of New Albany*, 88 Indiana, 473, was this: That where the constitution of a state forbids any municipal corporation ever to become indebted beyond a certain amount "in any manner

or for any purpose," that amount cannot be exceeded even for necessary current expenses. This, also, was the question in the case of *Prince vs. City of Quincy*, 105 Illinois, 138 (44 Am. Rep., 785). The contract under consideration in *Sackett vs. City of New Albany*, was one with the Game-well Fire Alarm and Telegraph Company, for three fire alarm strikers and five signal boxes, to be completed and placed in position for the city by the first of April, then ensuing, for the aggregate sum of \$3,325. A very different kind of contract, as the court will see, from that now under consideration, in this case.

Section 3 of Article 11 of the constitution of the state of Iowa is as follows:

"No county, or other political or municipal corporation, shall be allowed to become indebted, in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum of the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of said indebtedness."

The Supreme Court of Iowa in *Dively vs. City of Cedar Falls*, 27 Iowa, 233, in construing this provision of the constitution, held as follows:

"An obligation arising under a contract on the part of a municipal corporation to pay for

work, when, and as it shall be performed in the future, does not constitute or ripen into an indebtedness within the meaning of the constitution until the performance of the work."

Dively vs. City of Cedar Falls, 27 Iowa,
228.

Judge Wright, in delivering the opinion in that case, said :

"It is insisted, however, that the liability was created when the contract was made; that the city then became indebted but the obligation to pay so far as the time of its inception as between the parties is concerned, is one thing, and the actual indebtedness within the meaning of the constitution quite another."

Again, in *Grant vs. Davenport*, 36 Iowa, 398, it was provided by a certain ordinance that the city agrees to pay for 240 hydrants at \$80 each for the first five years, and \$70 each for the next five years, at \$60 each for the next five years, at \$50 each for the next five years, and at \$40 each for for the remainder of the time of the charter, the rent to commence as soon as 200 hydrants are ready for use. The question was, did this ordinance impose a debt on the city within the meaning of the constitutional provision limiting indebtedness? The court held that it did not, and

held further, "that where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute 'an incurring of indebtedness' within the meaning of the constitutional provision limiting the power of a municipal corporation to contract debts."

Grant vs. Davenport, 36 Iowa, 398.

In case *The City of Council Bluffs vs. Stewart*, 51 Iowa, 395, this case of *Grant vs. Davenport*, *supra*, was cited and the rule therein stated approved.

Section 12 of Article 9 of the constitution of the State of Illinois is identical with, and in fact was taken from, a similar provision, Article 11, Section 3, of the constitution of the State of Iowa, as follows:

"No county, or other political or municipal corporation, shall be allowed to become indebted, in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum of the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of said indebtedness."

In the case of *Buchanan vs. Litchfield*, 102 U. S., 278, the construction of the twelfth section of the ninth article of the constitution of Illinois was under consideration, this court holding that city bonds issued by the city under a statute of the state authorizing cities to construct water works, and for that purpose to appropriate and borrow money and levy and collect general taxes in the same manner as other municipal taxes, the city at the time of such issue being indebted up to the full limit fixed by the constitution, were, in the hands of an innocent holder, *void*. This was the *sole* question in any wise bearing upon the issue in this case, passed upon by this court in that case, and was, it is submitted, a very different one from that presented by the case at bar. This decision was at the October term, 1880.

That the Supreme Court of the State of Illinois did not regard the decision of this court in the case *supra* as *applicable* to a case such as now before this court is clearly evident from the fact that subsequently to this decision *supra*, at the May term, 1881, of the Supreme Court of the State of Illinois, a question similar to the one now under consideration was before that court, that court then holding as follows:

"Where a city entered into a contract for lighting its streets for a term of thirty years, the agreed price therefor to be paid monthly, which sum for any one year was not in excess of the

limitation in Section 12 of Article 9 of the constitution, but taken for the whole term, was in excess of the debt it was authorized to incur, it was held that the contract was not prohibited by the constitutional provision but was regular and binding, there being created *no present indebtedness for the whole sum*, but only as the gas *should be supplied from month to month.*"

East St. Louis vs. East St. L., Etc. Co., 98 Ill., 417.

The court in passing upon the question in case 98 Ill., *supra*, said:

"It is insisted further that the city had no power to make the contract in question, because thereby an indebtedness was incurred in excess of the limitation fixed by Section 12, Article 9 of the constitution of this state. The provision in this respect is that no municipal corporation 'shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum of the value of the taxable property therein,' etc. * * * *. It appears that the previous indebtedness of the city, existing at the time this contract was made, was \$20,000 short of this constitutional limitation. Two hundred lamps—the minimum number provided by the contract—at \$35.20 per lamp per year, would amount to \$7,040 in a year, and the aggre-

gate for thirty years to \$211,200. Now, the appellant's counsel contend that this aggregate sum of \$211,200 should be considered as the present indebtedness, as a debt incurred at the making of this contract on October 3, 1880. We do not assent to the correctness of this view. The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance of anything being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment monthly, at the end of each month, the amount that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability—an indebtedness arises—and not before, as we conceive. Hence, the amounts that might become due and payable under the contract in future years did not constitute a debt against the city at the time of entering into the contract, within the meaning of the constitution."

*E. St. Louis vs. E. St. L. L. G. L. & W.
Co., 98 Ill., 431.*

It is conceded the supreme court of Illinois has not, in reference to this question, been very stable or consistent with itself, inasmuch as it has declared somewhat different views upon this

subject from those so clearly and ably set forth in 98 Illinois, *supra*, both before and after that decision, notably, in the case of the *City of Springfield vs. Edwards*, 84 Illinois, 626, followed in *Culbertson et al. vs. City of Fulton et al.*, 127 Illinois, 36, and also in *Prince vs. City of Quincy*, 128 Illinois, 444. It is respectfully submitted, however, that in none of these cases is the opinion supported by the authority or reason by which that in the 98th Illinois is sustained. It would seem, furthermore, that the view enunciated in the 98th Illinois is supported by the Illinois court of appeals, in 31 Ill. App., 338, and also in the case of *City of Carlyle vs. Carlyle W. L. & P. Co.*, 140 Illinois, 445.

The constitutional restriction on indebtedness in the constitution of the state of Iowa, and a similar provision in the constitution of the state of Illinois, have been before this court quite frequently, notably in *Buchanan vs. Litchfield*, 102 U. S., 278, in *Litchfield vs. Ballou*, 114 U. S., 190, in *Doon Township vs. Cummins*, 142 U. S., 366, and in *Nesbit vs. Riverside Independent District*, 144 U. S., 610, but in each of these cases there had been an over issue of bonds—in *Doon Township vs. Cummins*, *supra*, by a district township of Iowa, and in the latter case by a school district. In the case in the 142 U. S., *supra*, this court, speaking through Mr. Justice Gray, clearly recognizes the distinction between this class of

cases and the class to which the one now before the court belongs, in these words:

"In the Supreme Court of Iowa, it is settled law that the constitutional restriction includes not only municipal bonds but all forms of indebtedness, *except warrants for money actually in the treasury, and perhaps contracts for ordinary expenses within the limits of the current revenues.*"

It is conceded by the pleadings that the revenues of the City of Walla Walla at the date of the execution of this contract, including the revenues which it was authorized by law to raise by taxation, would be equal to \$10,000 per annum in excess of all its ordinary expenses. The averment of the complaint is as follows: "That its revenues, including the revenues which it was authorized by law to raise by taxation, did not and would not exceed its ordinary expenses by more than \$10,000 per annum." (Complaint, Record, 3). While the averment in the answer on this subject is as follows: "We admit that its revenues including the revenues it was authorized by law to raise by taxation, did not and would not, exceed its ordinary expenditures by more than \$10,000 per annum." (Answer, Record, 22). These averments, therefore, are the equivalent of saying that the annual revenues of the city authorized by law to be raised by taxation were at least \$10,000 in excess of the ordinary expenditures of the city.

The leading authorities recognize a wide difference between what are known as current expenses of the municipality, payable out of current revenues, and extraordinary expenses, such as interest on railroad bonds, and the like. It is the item of expenses essential to the maintenance of corporate existence, such as lighting, water, sewers, salaries of officers, labor and the like that constitute current expenses payable out of current revenues. The authorities agree that current revenues may be applied to such purpose, even though the effect be to postpone judgment creditors.

Coy vs. City Council, 17 Ia., 1.

Coffin vs. City Council, 26 Ia., 575.

Grant vs. City of Davenport, 36 Ia., 396.

When the current revenues are sufficient to fully pay the current expenses necessarily incurred to maintain corporate levy, there cannot be said to be any debt.

City of Valparaiso vs. Gardner, 97 Ind., 1,
and authorities *supra*.

The decision of this court in *Lake County vs. Rollins*, 130 U. S., 862, does not in the least mili-

tate against the doctrine for which I am contending. In that case there was no question but that the issue of the county warrants, which were the subject of the action, was the creation of a debt. That these warrants created an indebtedness to the extent of the amount called for was admitted.

The question in that case was simply whether the constitutional provision in the constitution of the State of Colorado limited the amount of *all* indebtedness of *every nature* and for *every purpose*, or whether the limit only applied to debts by loan for the two purposes of, *first*, erecting necessary public buildings, and *second*, making or repairing public roads and bridges. This court held the provision was clear, direct and free from ambiguity, and was "a limitation upon the power of the county to contract any and all liabilities, including those sued upon in that action," beyond the amount specified in the constitutional limitation.

This case, therefore, and indeed all other cases decided by this court, so far as I have been able to examine, leaves it an open question as to what constitutes an *indebtedness* within the meaning of that term as used generally in constitutions and charters, especially as used in the Walla Walla charter as follows: "The limit of indebtedness of the City of Walla Walla is hereby fixed at \$50,000."

It leaves it an open and undecided question whether the execution of a contract to pay \$1,500 per annum, payable quarterly, for water furnished a municipality, to be paid for as furnished, and running through a period of twenty-five years, creates *eo instanti* an *indebtedness* within the meaning of such clause, of the whole \$37,500; or, does it only become such indebtedness when the water is furnished and the contingent liability ripens into an indebtedness, the city having full power under its charter to raise by taxation ample revenue each year to meet such indebtedness.

It is respectfully submitted the authorities, state and federal, are overwhelmingly to the effect that in such case the amount only becomes such indebtedness as the water is furnished and the money becomes due.

The contention is not that it is not a debt merely because the time of payment has been deferred, but rather that it does not become a debt at all until the water is furnished and the right to collect attaches.

In some cases it has been held that in order to prevent a liability from becoming a debt, within the meaning of a clause limiting the amount of indebtedness, it is necessary at the time of creating the liability to provide for levying and collecting taxes sufficient to meet it. But in the most, if not all, of such cases it will be found on

examination the provision limiting the indebtedness makes such a proceeding necessary.

For instance, the provision in the state constitution of Texas, Article 11, Sections 5 and 7, is as follows:

"No city shall ever incur a debt for any purpose or in any manner, unless at the same time provision is made for levying and collecting a tax sufficient to pay the interest and a sinking fund of at least two per cent per annum."

But even in this view, ample provision is made in the city charter for levying and collecting each year a tax sufficient to meet annually the \$1,500 called for by this contract, in addition to an amount necessary to meet all other ordinary expenses of the city.

The case of *Colson vs. the City of Portland*, 1 Deady, 481, does not involve or touch the question involved in this case. The question there to be decided, as stated by Judge Deady in his opinion, was this: "Can the city legally issue interest coupons to railroad bonds, payable half yearly, through a period of twenty years, amounting in the aggregate to over \$300,000.

In regard to the contention that the city has exceeded its power in creating debts in excess of \$50,000, it is scarcely necessary to do more than cite what was said by the court below in its opinion in regard to this matter. The court said:

"The aggregate amount to be paid under the contract by the city cannot be regarded as a debt incurred in excess of the amount limited by the 105th section of the charter, for, by the terms of the contract, the city became obligated to pay in quarterly installments as the same should be earned by compliance with the contract on the part of the water company. If any part of the money is not earned, the city will not have to pay it. If the money shall be earned, the city will avoid an accumulation of debt by paying according to the contract. Notwithstanding the very respectable authorities cited by counsel for the city, I hold that while the contract creates a binding obligation, it does not create a debt. The item of expense for water under this contract stands precisely the same as other items of regular current expenses incidental to running the government and provided for by contracts or ordinances of the city." (Record, 345).

POINT V.

IN ANY EVENT THE CONTRACT IS ONLY VOID TO THE EXTENT THAT IT CREATES AN INDEBTEDNESS IN EXCESS OF THE CONSTITUTIONAL LIMITS.

Conceding for the argument that the whole sum covered by the contract, twenty-five times

fifteen hundred, equaling thirty-seven thousand five hundred dollars, (\$37,500), was, as of the date of the contract, an indebtedness within the meaning of Section 105 of the city charter, it would not by any means render the contract wholly void. It is submitted it would only be void and incapable of enforcement insofar as this \$37,500, added to the existing debt of the city, would exceed the \$50,000 limit of the charter. The pleadings (Complaint, Record, 3; Answer, Record 21) show that the City of Walla Walla, at the time this contract was made, was, to use the language of both complaint and answer, "*indebted in a sum exceeding sixteen thousand dollars.*" It nowhere appears, however, either in the pleadings or evidence, what amount *in excess* of \$16,000 the city was then indebted. It may have been one dollar, one hundred dollars or five thousand dollars; but for all the purposes of this suit the court will not presume the existence of an indebtedness greater in amount than will meet and fully satisfy the allegations in the case—\$16,500 will do this. There is no claim it was more than this, or indeed as much. It was simply a sum exceeding \$16,000. We add sixteen thousand five hundred, therefore, to thirty-seven thousand five hundred, and we have an aggregate of indebtedness, conceding the whole \$37,500 to be a debt within the meaning of the charter, of \$54,000, or an indebtedness of \$4,000 only in excess of the limit fixed by the charter.

On the ground assumed, therefore, by the appellant that a debt of \$37,500 was created *eo instanti* by the execution of the contract, \$33,500 of it would be valid. The contract would only be invalid, it is submitted, insofar as it created an indebtedness in excess of the power of the city to contract a debt, and, therefore, only void as to the last two years and seven months of the twenty-five years the contract run.

McPherson vs. Foster, 43 Ia., 48.

Wiley vs. Silliman, 62 Ill., 170.

Grant vs. City of Davenport, 36 Ia., 401.

Dively vs. Cedar Rapids, 27 Ia., 227.

AUTHORITIES.

"Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the constitution, provided, the allowed and prohibited parts are severable. We think a severance is possible in this case. It may be conceded the ordinance is too broad, and that some of its provisions are unwarranted."

Packett Co. vs. Keokuk, 95 U. S., 89.

Conceding for the purpose of argument, that the contract for \$37,500 created an indebtedness, it would only be invalid as to the extent of the excess over and above the constitutional limit.

Hasbroucke vs. Milwaukee, 13 Wis., 37.

East St. Louis vs. Gas Co., 98 Ill., 415.

McPherson vs. Foster Brothers, 43 Iowa, 48.

Stockdale vs. Wayland School Dist., 47 Mich., 226.

Culbertson et al. vs. City of Fulton et al., 127 Ill., 38.

Mix vs. People, 62 Ill., 241.

2 Dillon on Mun. Corp., Sec. 334, 335 and note.

In the case of *McPherson vs. Foster Brothers*, 43 Iowa, 48, the court having under consideration a contract to build a school house, for which the contractors were to receive \$15,000 in bonds of the district, when the amount of indebtedness for which the district could lawfully contract for was only \$2,057.50, the supreme court of that state said :

"We have seen that for the excess over the prescribed limit no right of action exists against the district. The question now arises, Is the district liable to the amount of the indebtedness within the restricted limit? We think it is. We have seen the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of \$2,057.50 by bond. If the debt exceeds that amount it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the non-existence of a valid debt therefor. But this restriction does not extend to the sum of \$2,057.50 for which the district had power to issue its bonds. That sum is a valid debt."

In the case of *Culbertson et al. vs. City of Fulton*, 127 Illinois, *supra*, the court said :

"The indebtedness, however, can only be regarded as void to the excess over the constitutional limit. Up to and under that limit the indebtedness is valid. The inhibition operates upon the indebtedness and not upon the form of the debt."

The following is the conclusion of lengthy note in 44 Am. St. Reps., 242-243 :

"All indebtedness incurred beyond the constitutional limit is void and not enforceable, while, perhaps, there may be instances in which the ordinance or contract attempting to create indebtedness is of an indivisible character, so that it will be difficult, if not impossible, to sustain a part and disregard the residue; yet no case of that character has come within our observation, and the decisions up to the present time have treated as valid such part of the indebtedness as fell within the constitutional limit. Where the dates of the issue of the several obligations can be ascertained, those first issued are treated as valid until the constitutional limit is reached; but where such is not the case and all the obligations appear to have been incurred, or evidence of indebtedness issued at the same time, each is treated as partly valid and partly void, and a recovery may be sustained thereon, based upon the proportion which the indebtedness that the municipality was authorized to incur bears to the whole indebtedness attempted to be incurred. *Daviess County vs. Dickenson*, 117 U. S., 657; *Citizens Bank vs. Terrell*, 78 Tex., 450; *McPherson vs. Foster*, 43 Ia., 48; 22 Am. Rep., 215; *State vs. Maher, Etc.*, 32 Neb., 568; *Dunn vs. Great Falls*, 13 Mont., 58."

The contract in question is a divisible one. Conceding that the whole amount \$37,500, is a present indebtedness within the meaning of the clause in the city charter, and conceding further-

more that this amount was by four thousand dollars in excess of the limit of indebtedness beyond which the city could not go, the contract is clearly good up to the fifty thousand dollar limit. It is not believed, however, the court will find it necessary to consider this phase of the case.

It is respectfully submitted the decree of the circuit court should be affirmed.

JOHN H. MITCHELL,
Solicitor for Respondents.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CITY OF WALLA WALLA <i>et al.</i> , Appellants,	}	No. 250.
<i>vs.</i>		
THE WALLA WALLA WATER COMPANY, Appellee.		

**Appeal from the Circuit Court of the United
States for the District of Washington.**

**Supplemental Brief of John H. Mitchell, on
part of Appellee, and in reply to Brief
on part of Appellants.**

The former brief on part of appellee having been prepared before that on part of appellants was filed, it is deemed proper that a few suggestions supplemental, and also in reply, should be submitted.

I.

Counsel for appellants seek to raise the question of jurisdiction of the court below.

It is respectfully submitted, inasmuch as the question of jurisdiction *alone* was not certified to this court from the court below, as provided by the last clause of the first subdivision of section 5 of the act of March 3, 1891, establishing Circuit Courts of Appeals, appellants are not permitted to raise the question here. Especially must this be so, as there is nothing in the case that would enable appellants to bring it direct to this court on appeal if it be true, as contended by counsel, that there is no Federal question involved. The alleged absence of any Federal question is the *sole* ground upon which counsel insist there was a lack of jurisdiction in the court below, and yet the *existence* of a Federal question is absolutely *essential* to the maintenance of this appeal.

Counsel in bringing the case here assume it is here properly on a Federal question, namely, one involving the construction and application of a clause of the Constitution of the United States, and now the court is asked to hold there is no Federal question involved for the purpose of denouncing jurisdiction in the court below. As no other question in the case is properly before this court, if it be true there is no Federal question in the case, then the case can not be said to be here at all

on a question *other* than that relating to jurisdiction of the court below. Were it here on a question *other* than one involving the jurisdiction of the court below, then *possibly* this court might also pass upon that question.

Horner *v.* The United States, 143 U. S., 576.

But conceding the case to be properly here on questions other than those affecting the jurisdiction of the court below, it is not perfectly clear, from the opinion in Horner *v.* The U. S. (*supra*), whether the court meant to be understood as holding where a case came direct to this court, and in which the constitutionality of a law of Congress is drawn in question, that this court acquires jurisdiction of all questions involved, *including* the question of the jurisdiction of the court below, *or* of all questions involved, *except* that of the jurisdiction of the court below.

It is submitted, as the act relating to appeals, and writs of error prescribes a *special mode* of having the question of jurisdiction of the court below determined by this court—namely, by a certification from the court below—that a failure of a party to conform to this mode should be regarded as a waiver of the question. But a still more conclusive reason why this court should not pass upon the question of jurisdiction of the court below in the absence of a certification is, that it is only by such certification that this court can acquire jurisdiction to do so.

The claim of counsel for appellants that no Federal question is involved, and, therefore, the court below had no jurisdiction, can not be maintained.

The claim of counsel for appellants that the acts of the city of Walla Walla, in contracting with the Walla Walla Water Company, and in passing the ordinance providing for the erection of water works were not the exercise of sovereignty; that the city in those matters was not acting as the agent of the State, but was merely exercising a power as trustee and agent of the city and its citizens, representing solely their pecuniary and proprietary interests, can not be maintained for one moment. Besides, this claim on the part of counsel is in direct conflict with the subsequent claim of counsel in their brief, while contesting another branch of this case.

No one thing has ever been more definitely or distinctly settled by this court, than the proposition that an ordinance and contract of a city, authorizing a corporation to dig up and use streets and alleys for the purpose of laying pipes and mains, for the purpose of supplying a city with water, under a charter empowering a city to do so, is an *exercise of legislative power*. It is the *granting of a franchise* belonging to the state.

New Orleans Gas Company *v.* Louisiana Light Company, 115 U. S., 650-660;

New Orleans Water Works Company *v.* Rivers, 115 U. S., 674-681;

The State *ex rel.*, etc., *v.* The Cincinnati Gas Light and Coke Co., 18 Ohio St. Rep., 291 ;

Crescent City Gas Light Co. *v.* New Orleans Gas Light Co., 27 La. Ann., 138 ;

St. Tammany Water Works *v.* New Orleans Water Works, 120 U. S., 64 ;

New Orleans Water Works *v.* Louisiana Sugar Co., 125 U. S., 31.

In the case of *Rivers (supra)*, this court, speaking by Mr. Justice Harlan, said :

“ The right to dig up and use streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with water, *is a franchise belonging to the State*, which she could grant such citizens or corporations, and upon such terms as she deemed best for the public interests.”

The Supreme Court of the State of Ohio, in the case 18 Ohio (*supra*), said :

“ We think it can not be doubted that the right to use the streets of the city for the purpose of laying pipes to convey gas, whether in the hands of a private corporation or a natural person, *is a franchise*, and as such can *only emanate directly or indirectly from the sovereign power of the State*, and the position that the city council of Cincinnati, in making the contract with Cameron, is to be regarded as a private corporation, granting an easement in its own property, can not be maintained.”

The Supreme Court of Louisiana, in case of Crescent City Gas Light Company *v.* New Orleans Gas Light Company (27 La. Ann., 138-147), said :

“ The right to operate gas works to illuminate a city is not an ancient or usual operation of citizens generally. No one has the right to dig up the streets and lay down

gas pipes, erect lamp posts, and carry on the business of lighting the streets and houses of New Orleans *without special authority from the sovereign. It is a franchise belonging to the State*, and in the exercise of the police power the State could carry on the business itself or select one of several agents to do so."

It is respectfully submitted, therefore, that the claim of counsel that the contract between the city of Walla Walla and the Water Company, as exemplified by the city ordinance and the written contract made in pursuance thereof (Record, 3-8), was not the act of the State, and therefore no Federal question was involved, and hence the conclusion that the court below, for this reason, had no jurisdiction, both parties to the suit being citizens of the same State, is untenable, and can not be successfully urged here.

Besides, conceding for the argument, that the making of the contract with the Water Company was not the exercise of sovereignty upon the part of the city, and that it was a valid contract between the parties—the city acting, not as the agent of the State, but simply as the representative of the pecuniary and proprietary interest of the citizens of the city—even then, it is a *contract the obligations of which* are protected against impairment by the Constitution, and if in the subsequent proceedings of the city in providing for the erection of its own water works it acted as the agent of the State and exercised sovereign functions, then a Federal question was involved. That the city did so act in providing for the erection of its own water works counsel concede, and indeed insist upon it in the latter part of their brief.

Besides, if this contention of counsel for appellants (see their brief, 2-10), is granted, then this appeal must be dismissed for want of jurisdiction in this court.

If there were no Federal question involved in this case, where do the appellants get their authority for this appeal?

What are the Chartered Powers of the City of Walla Walla?

Attention of the court is attracted to the following specification of powers of the city of Walla Walla under its charter approved November 28, 1883, which went into effect January 1, 1884, and under which the contract with the Water Company was made:

Section 2. By this section the inhabitants within the city of Walla Walla are constituted and declared to be a municipal corporation, by the name and style of the "*City of Walla Walla*," and it is empowered to "*contract and be contracted with.*"

* * * * *

Section 3 provides: "The city of Walla Walla has power to assess, levy and collect taxes for general municipal purposes, not to exceed one-half per centum per annum, upon all property, both real and personal.
* * * And to levy and collect special taxes, as hereinafter provided, but all taxes for general and special municipal purposes shall not exceed in any year one-half per centum on the property assessed."

* * * * *

Section 4. By this section the city is empowered "to make regulations for *prevention of accidents by fire.*" "To organize and establish fire departments, and shall have control thereof, and ordain rules for the government of the same."

This section confers the further power "to provide fire engines and other apparatus, and a *sufficient supply of water.*" This section further authorizes the city "*to levy and collect special taxes for these purposes,* not to exceed in any year three tenths of one per centum upon the taxable property," etc.

* * * * *

Section 9. "The city of Walla Walla shall have power to cause every person to keep his property, or the property he occupies or controls, and the adjacent streets and alleys, *clean and free from all things dangerous to health, or offensive to the senses, or dangerous to travellers, and to keep said streets and alleys free from inflammable material,* and to cause owners of public halls and other buildings to provide suitable means of exit, *to abate all nuisances, and provide for the public safety.*"

* * * * *

Section 10. By this section it is provided that :

"The city of Walla Walla is hereby authorized to *grant the right to use the streets of said city for the purpose of laying gas and other pipes* intended to furnish the inhabitants of said city with light or water, to any persons or association of persons, *for a term not exceeding twenty-five years,* and to authorize and forbid the location and laying down of tracks for railways and street railways, telegraph and telephone appliances, on all streets, alleys, public places," etc.

* * * * *

This section has the further provision, "provided always that none of the rights or privileges herein

granted shall be exclusive, nor prevent the council from granting the same right to others."

* * * * *

Section 11. By this section it is provided as follows:

"The City of Walla Walla shall have power to erect and maintain water works within or without the city limits, or to authorize the erection of the same, for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water. And for the purpose of maintaining and protecting the same from injury, and the water from pollution, its jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, springs, trenches, pipes and drains used in, and necessary for, the construction, maintenance and operation of the same, and over the streams or sources from which the water is taken for five miles above the point from which it is taken, and to enact the ordinances and regulations necessary to carry the power herein conferred into effect; but no water works shall be erected by the city until a majority of the voters, who shall be those only who are free-holders in the city, or pay a property tax therein on not less than \$500 worth of property, shall, at a general or special election, vote for the same. Such proposition shall be formulated and submitted not less than 30 days before election." (Rec., 2.)

Section 12. By this section the city is—

"authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works, and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof; said city shall have power to regulate the sale of water thus brought therein, and the moneys arising shall constitute a fund to be used to defray the expenses of operating the same, and to pay the purchase price thereof; and said city may levy and collect a

special tax each year, until the necessity therefor ceases to exist, not to exceed two-tenths of one per centum: *Provided*, however, no such tax shall be levied or collected until the question has been submitted, as provided in section 11 of this act, to electors as therein named, and a majority thereof at an election shall favor the same." (Record, 2.)

* * * * *

Section 22. By this section it is provided as follows:

"The city of Walla Walla shall have power to adopt proper ordinances for the government of the city and to carry into effect the powers given by this act."

* * * * *

Section 23. By this section it is provided as follows:

"The city of Walla Walla shall have power to establish and regulate the fees and compensation of all its officers, except when otherwise provided, and have such other power and privileges not here specifically enumerated as are incident to municipal corporations."

* * * * *

Section 24. By this section it is provided as follows:

"The power and authority hereby given to the city of Walla Walla by this act shall be vested in a mayor and council, together with such other officers as are in this act mentioned, or may be created under its authority."

* * * * *

Section 43. This section provides as follows:

"The city council shall possess all the legislative power granted by this act."

* * * * *

Section 90. By this section it is enacted as follows:

"The city of Walla Walla is not bound by any contract, or in any way liable thereon, unless the same is authorized by a city ordinance and made in writing and by order of the council, signed by the clerk or some other person in behalf of the city. But an ordinance may authorize

any officers or agent of the city, naming him, to bind the city without a contract in writing for the payment of any sum of money not exceeding \$100."

* * * * *

Section 99. By this section it is provided, among other things, as follows:

"And the city of Walla Walla *may exercise the right of eminent domain to take any private property for any use of the city embraced within any of the objects or purposes of this act.*"

* * * * *

Section 103. This section provides as follows:

"The rights, powers and duties, and liabilities of the city of Walla Walla, and of its several officers, *shall be those prescribed in this act*, and this act is hereby declared a public act."

* * * * *

Section 105. This section provides as follows:

"The limit of indebtedness of the city of Walla Walla is hereby fixed at \$50,000."

Section 106. This section reads—

"All acts and parts of acts relating to the incorporation of Walla Walla City, and not herein reserved, are hereby repealed."

Act of November 28, 1883; Session Laws, Territory of Washington, 1883, pages 270-288.

It is believed the foregoing are all the provisions of the charter under which the contract in question was made, which can have any possible bearing upon the questions involved. Those sections quoted which refer specially to the powers of the city as to taxation have bearing more particularly on the question as to whether

the city exceeded its limit of indebtedness in the contract made with the Water Company ; while sections 103 and 106 have reference to the repeal of the act of December 1, 1881, relied on by counsel for appellants. (See their brief, page 38.)

The question arises, therefore, did the city of Walla Walla have power to make the contract with the Water Company ? It is respectfully submitted it did have such power.

ARGUMENT.

It is not claimed that the city of Walla Walla has the power under this charter to grant any *exclusive franchises*, in the ordinary sense of those terms, to any one water company. On the contrary, it is conceded at the outset that the city has *not* the power to grant to, or to contract with one person, company, or corporation, for a water supply of the city, in such manner or on such terms as will prevent it from granting a similar franchise on the same or different terms to another person, company, or corporation, or indeed any number of them. And it is submitted the contract in question does not attempt to do this.

The contention, however, is this : That the fair, logical, and indeed only proper construction of the charter is, that in the event the city determines, *instead* of erecting its own water works, as empowered to do by the eleventh section of the charter, to *authorize* their erection by another party, either individual, company, or corpo-

ration, as also empowered by section 11 of the charter, that *then* the city possesses the *incidental power* of stipulating either that the city will not, during the period covered by such contract—in this case twenty-five years—erect water works of its own, and thus become a competitor; or if it does, it will only do so by purchasing the works of the company contracted with, provided always, that such stipulation is of such character as will not in any substantial manner deprive the city in the future, in the full exercise of the police power, of protecting the public health, the public morals, and the public safety of the city.

It is conceded the city has not the power, under its charter, to contract away any of its legislative functions the exercise of which may be necessary in the future to protect the public health, the public morals, or the public safety of the city.

But having the power *expressly* granted by the charter to contract with a water company *for the use of the streets for twenty-five years*, and having the alternative power conferred upon it to either erect water works of its own or *authorize their erection*, and having availed itself of this latter mode of securing a water supply, instead of erecting its own works, then, it is respectfully submitted, it possesses the *incidental power* to make any kind or character of contract, as to *non-competition by the city*, it may deem essential to effectuate the purpose of the *express power*, *provided* always, that the stipulations of such contract do not involve any surrender of legislative power, the exercise of which is or may be, in any man-

ner, or to any extent, *essential* to the preservation of the public health, the public morals, and the public safety.

This, it is submitted, is the fair, reasonable, and proper construction of the powers vested in the city by this charter. And that the act of the city in making this contract has been wholly within the scope of the powers conferred, I shall endeavor to show later on.

What are the powers which a municipal corporation can exercise?

Mr. Dillon, in his work on Municipal Corporations, says, and his definition has been frequently cited with approval by this court :

First, Those granted in *express* words :

Second. Those ^{*necessarily*} ~~implied~~ or fairly implied in, or incident to, the powers expressly granted ; and

Third. Those ^{*Essential*} ~~necessary~~ to the declared objects and purposes of the corporation.

It is true, there is no express authority given in the charter authorizing the city, *in terms*, to stipulate, in a contract with an outside party, for a water supply for the city, that the city would not, during the period covered by the contract, erect works of its own, or if it did, that it would only do so by purchasing those of the company, but it is respectfully submitted, in the very nature of things, is not such a power *fairly*, if not,

indeed, *necessarily included in, and incident to*, the power *expressly* granted? But not only so, is not such a power,—to be exercised always, as already stated, without encroaching upon the police powers of the city, in so far as the exercise of such power is necessary to the protection of the public health, the public morals, and the public safety—a power *absolutely essential* to the declared objects and purposes of the corporation?

What person, or company, or corporation, in any State of this Union, in sane moments, could be induced to expend vast sums of money, the expenditure of which is always necessary in erecting a water plant for any city, however small, if it were understood that the city could, at any moment, erect water works of its own and become an immediate competitor with its contractor, and thus destroy the value of the contractor's works?

It is submitted that the *express* grant of power, empowering the city, at its option, to "*authorize the erection of water works*," instead of *erecting such works itself*, necessarily carried with it such *incidental powers*, the exercise of which are *essential*, in order to enable the city to effectuate the purpose of such express power. And it is plain that such *incidental power* can be exercised, and, indeed, was, as a matter of fact, exercised in the making of the contract in question, without trenching in the slightest degree upon the sovereign power of the city to protect, by the exercise of its police power, the public health, the public morals, and the public safety of the city.

But always keeping distinctly in view this preserva-

tion of the police power, for the three purposes specified, is there not in the city charter, outside of the particular clauses authorizing a contract for a water supply, and the use of the streets for such purposes, for twenty-five years, ample *express power* to justify the action of the city in inserting in their contract with the water company the provision that the city would not, during the existence of the contract, erect water works of its own, unless by purchase of the company's works?

The city, as has already been shown, is *expressly empowered* by the charter "*to contract and be contracted with.*" It is empowered *expressly*, in the eleventh section of the charter, "*to authorize the erection of water works,*" and in the twelfth section to "*purchase or condemn water works, already erected, or which may be erected.*" If the city had the right, as it unquestionably had, to purchase water works then erected, or that might thereafter be erected, then it had the undoubted right to take an option by contract to purchase works, either then erected or to be erected in the future. And having the clear right, not only to contract for and authorize the erection of works, but also to purchase the same after they were erected, then, if in order to exercise with effect these *express* powers it became necessary to stipulate that the city would not erect works of its own, and that was a question for the city *alone* to determine, it had the clear power to so stipulate, *provided* such stipulation did not operate as a surrender of any portion of the police power, the exercise of which might be necessary in the future for the three specific purposes already indicated.

Speaking of the necessity of governments at times surrendering portions of their legislative powers, and of granting inducements to capital, the following is in point.

This court, speaking by the late Justice Davis, in the Binghampton Bridge case (3 Wall., 74), said :

"The wants of the public are often so imperative that a duty is imposed on government to provide for them ; and, as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the power of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public spirited citizens : ' If you will embark with your time, money, and skill in an enterprise which will accommodate the public necessities, we will grant to you for a limited period privileges that will justify the expenditure of your money and the employment of your time and skill ; ' such grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

As bearing upon the question of the *power* of the city under the charter to stipulate and agree with the Water Company that it would not during the period covered by the latter's contract, erect, maintain, or become interested in any water works, save those of the Walla Walla Water Company, except by taking, condemning, and paying for the said company's works, attention is attracted to the latter clause of section 10 of the charter.

This clause reads as follows :

" Provided, always, that none of the rights or privileges herein granted shall be exclusive, *nor prevent the council from granting the same right to others.*"

This provision clearly means that the power of the city to make these grants is to be unrestricted as to per-

son and number; that there is reserved to the city the power of making as many grants, or giving as many licenses to as many different persons as in the judgment of the city officials is deemed best. It evidently was not intended, however, to inhibit the city from agreeing to not become a competitor with its own contractor. If such were the intention of the legislature, then something more in the way of inhibition on the *incidental* powers of the city was necessary. If we are correct in holding that the *express* grants of powers contained in the charter carry with them the *incidental* power authorizing the city to make such an agreement, and as essential to the declared objects and purposes of the municipality, then we insist the clause at the close of section 10 (*supra*) can not be held to operate as an inhibition or limitation on the exercise of such *incidental* power. Had such been the purpose of the legislature, it would, in addition to having said, "That none of the rights or privileges herein granted *shall* * * * *prevent the council from granting the same right to others,*" have added:

" Or the city from exercising the same, or similar rights."

The *inclusion* of the one is the *exclusion* of the other. Had the clause stopped with the word "*exclusive*" omitting the words, "*nor prevent the council from granting the same right to others,*" there would be more reason for holding that the city was estopped from agreeing not to become a competitor; but even then, it is respectfully insisted, the use of the words, "*shall not be exclusive,*" could only be properly construed as applicable to grants and licenses issued by the city conferring rights and

privileges on third parties, and not to acts of internal improvements carried on by the city itself.

It is submitted a fair construction of the charter as a whole justifies the conclusion that there is no restriction whatever, either in the clause in section 10 (*supra*), or in any other part of the charter, on the incidental power which clearly exists, authorizing the city to stipulate, as it did in the contract with the water company, not to become a competitor, except on condemnation and purchase; and having so contracted, the city is estopped from assailing the contract, both constitutionally and morally.

**The contract does not limit the police powers
of the city.**

Upon the question that the contract with the water company does not in any manner, or to any extent, limit or circumscribe the police power of the city to protect the public health, the public morals, or the public safety, the court is referred to former brief on the part of appellee, pages 40-43; also pages 36, 47; also to discussion of that question in the present brief.

What was so well said by Mr. Justice Harlan upon a similar question in the *Rivers* case (115 U. S., 681) may with propriety and force be said in this case.

In that case, this court, after holding that there was in that case a contract whose obligations could not be impaired by the State, said :

“ It is idle to insist that this contract was prejudicial either to the public health or to public safety, as might perhaps be said to be the case if the State, after making it, was prevented from exercising any control whatever

over the matter of supplying the city and its inhabitants with water. But notwithstanding the exclusive privileges granted to the plaintiff, the power remains with the State, or with the municipal government of New Orleans, acting under legislative authority, to make such regulations as will secure to the public the uninterrupted use of the streets, as well as prevent the distribution of water unfit for use, and provide for such a continuous supply in quantity as protection to property, public and private, may require. In the case just decided (*New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., 650), we said: 'The constitutional prohibition upon State laws impairing the obligation of contracts, does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense as are all contracts and all property, whether owned by natural persons or corporations.'

New Orleans Water Works Co. v. Rivers, 115 U. S., 681.

In addition to statements in former brief (pages 40-43) showing that under this contract the city retains full control and power to protect the public health, the public morals, and the public safety, special attention is called to the provision of section 11 of the charter (Record, 2), by which *absolute jurisdiction and control* is retained by the city over all water works which may be erected—whether erected by the city or by a third party *authorized* by the city.

The clause is as follows:

"And for the purpose of maintaining and protecting the same" (the water works) "*from injury, and the water from pollution, its jurisdiction*" (the city of Walla Walla) "*shall*

extend over the territory occupied by such works, and all reservoirs, streams, springs, trenches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same, and over the stream or source from which the water is taken for five miles above the point from which it is taken, and to enact all ordinances and regulations necessary to carry the power herein conferred into effect."

Again, by section 9 of the charter, further jurisdiction and power are given the city over all persons, companies, and corporations owning, occupying, or controlling property within the city limits, which includes, of course, the Water Company, and whereby the city, notwithstanding the contract, can protect the public health, the public morals, and the public safety.

The section is as follows :

"Section 9. The city of Walla Walla shall have power to cause every person to keep his property or the property he occupies or controls, and the adjacent streets and alleys clean and free from all things dangerous to health, or offensive to the senses, or dangerous to travellers ; and to keep said streets and alleys free from inflammable material, and to cause owners of public halls and other buildings to provide suitable means of exit, to abate all nuisances, and provide for the public safety."

These clauses of course were incorporated into, and became a part of the contract, as did every other provision of the charter. And in virtue of these several provisions of the charter, as also the several reserved powers on part of the city *in the contract itself* (Record 6-8), the city is possessed of ample, in fact wholly unrestricted, power to protect the public health, the public morals, and the public safety, without in any manner or in the slightest degree impairing the obligation of its contract with the Water Company.

Even in the absence of any specific grant of power to the city of Walla Walla, authorizing the city to exercise the right of eminent domain, it would have that power; it is, however, specifically granted in the charter of the city. (Sec. 12 of city charter; Record, 2.) So it is clear the city had full power to stipulate to that effect in the contract; besides, without any such stipulation, the city had the power to condemn the works to its use by making just compensation, and not have been guilty of an act of Punic faith, a charge the city can not escape from in view of its present action.

This court, in the case of *Rivers* (115 U. S., 673), said:

"The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. (*West River Bridge Company v. Dix*, 6 How., 507; *Railroad Company v. Louisa R. R. Company*, 13 How., 71; *Boston Water Power Company v. Boston and Worcester Railroad Company*, 23 Pick., 360; *Boston and Lowell R. R. Company v. Salem and Lowell R. R. Company*, 2 Gray, 1-33.)

"In that way the plighted faith will be kept with those who have made large investments on the assurance of the State that the contract with them will be performed."

The execution of the contract with the Water Company, so far from being a surrender on the part of the city of its police power to protect the public health and the public safety was, it is submitted, a wise exercise of the power in furnishing the city and its inhabitants with good, wholesome, healthful water.

While the power of the State to protect, through her cities and towns and other public agencies, the public

health, the public morals, and the public safety, can not be relinquished or surrendered, yet the State and its municipalities may provide for these purposes any means that will effect the end, such as contracting with competent and trusty persons to take the matter in charge under the supervision and control of the State or city.

City of Louisville *v. Weible et al.*, Court of Appeals of Kentucky, 1st S. W. Rep., 605.

Indeed, it is quite impossible to imagine any act upon the part of the city that might at any time in the future become necessary for the protection of the public health, the public morals, or the public safety, but could be done by the city, either in its sovereign capacity as agent and representative of the State, or in its proprietary capacity as agent of the city and its inhabitants, and at the same time not impair the obligation of its contract with the Water Company.

The single fact that the Water Company agreed to *sell*, or what is the same thing, that the city might "*at any time take, condemn and pay for the water rights and works of the company,*" the city reserving expressly the right to take the company's works in that manner, with the further *express* stipulation, "*that in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company,*" is in and of itself a complete answer to the suggestion that the city in making this contract surrendered any portion of its police power.

For convenience of the court, this vital part of the contract is here given in *hæc verbæ* :

" And this contract is voidable by the city of Walla Walla, so far as it requires the payment of money upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of the Water Company to keep or perform any agreement or contract on its part herein specified, or in this contract herein contained; but accident or reasonable delay shall not be deemed such failure. *And until this contract has been so avoided the city of Walla Walla will not erect, maintain or become interested in any water works, except the one herein referred to, save as hereinafter specified.*"

What is "*hereinafter specified*," is as follows :

" Neither the existence of this contract, nor the passage of ordinance No. 270 " (this is the ordinance authorizing the contract), " shall be construed to be, or be, a waiver of, or relinquishment of any rights of the city to take, condemn and pay for the water rights and works of said company or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company."

The ordinance approved March 19, 1887 (Record, 3-5), and the written agreement made in pursuance thereof (Record, 6-8), constitute a valid contract.

In support of above proposition, see former brief (35-49, 56-64); also the following authorities :

This court, in the case of *New Orleans Gas Company v. Louisiana Light Company* (115 U. S., 660), speaking by Mr. Justice Harlan, said :

"It will, therefore, be assumed in the further consideration of this case, that the charter of the Crescent City Gas Light Company, to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation, with authority to manufacture gas and to distribute the same by means of pipes, mains and conduits, laid in the streets and other public ways of New Orleans—constituted, to use the language of this court in the case of the *Delaware Railroad Tax* (18 Wall., 206), 'a contract between the State and its corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts,' and therefore 'equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators.' (See, also, *Greenwood v. Freight Company*, 105 U. S., 13-20; *New Jersey v. Yard*, 95 U. S., 104.)"

And speaking further, this court, in the *Louisiana Gas Company* case (115 U. S.), says :

"If the State can, by contract, restrict the exercise of her power to contract and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation by the granting of exemptions from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority, when not forbidden by her own organic law—in consideration of money to be expended, and important services to be rendered for the promotion of the public comfort, the public health, or the public safety—to grant a franchise to be exercised

exclusively by those who thus do for the public what the State might undertake to perform, either herself or by subordinate municipal agencies."

This court, in *New Orleans Water Works Company v. Rivers* (115 U. S., 674), decided at the same term, again speaking by Mr. Justice Harlan, said :

"This case is therefore controlled by the decision just rendered in *New Orleans Gas Light Company v. Louisiana Light Company* (*ante*, 650). The two are not to be distinguished in principle. If it was competent for the State, as we have held, to provide for supplying the city of New Orleans and its people with illuminating gas, by means of pipes, mains and conduits, placed at the cost of a private corporation in its public ways, it was equally competent for her to make a valid contract with a private corporation *for supplying by the same means pure and wholesome water for a like use in the same city.*"

In *New Jersey v. Yard* (95 U. S., 114), this court, speaking by the late Justice Miller, said :

"It has become the established law of this court that a legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the State, within the protection of the clause referred to of the Federal Constitution.

The case of the *Atlantic Water Works Company v. Atlantic City* (6th Atlantic Rep., 25) is directly in point.

In that case the city charter gave its common council power to provide by ordinance "*for a supply of water by said city.*"

In consideration of certain privileges granted by the municipality, and its stipulation to pay a specified sum annually for the use of water in the extinguishment of

fires, the plaintiff covenanted to supply Atlantic City with water. The contract was to continue as long as the company should comply with its obligations, and by one of its clauses the city was empowered to put an end to the contract whenever so minded, by a purchase of the works of the plaintiff. This was held to be a valid contract.

6th Atlantic Rep., 25.

In the case of *Bridge Proprietors v. The Hoboken Co.* (1st Wall., 116-146), this court, speaking by the late Justice Miller, said:

"Without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended; on the faith of this enactment they invested the money necessary to erect the bridges. These acts and provisions on the one side and the other are wanting in no element necessary to constitute a contract."

The above, from Justice Miller, was quoted and approved by Mr. Justice Harlan (in 115 U. S., 625), saying:

"In above case, it was decided that a statute of New Jersey empowering certain commissioners to contract for the building of a bridge over the Hackensack River, and providing not only that the 'said contract should be valid on the parties contracting as well as on the State of New Jersey,' but that it should not be lawful 'for any person or persons whatsoever to erect any other bridge over or across the said river for ninety-nine years,' was a contract whose obligation could not be impaired by a law of the State."

Counsel for appellants cite the Slaughter House cases, the Fertilizing cases, the Freight Rate cases, the Boston

Beer Company case, the Lottery and other cases, heretofore passed upon by this court, but none of these can have any application to the case at bar, and they were all brushed aside as inapplicable to a case of this character, by this court, in the two cases—the case of the Gas Light Company and the Rivers case (115 U. S.). All these cases were cited by counsel in opposition to a doctrine laid down by this court in those cases. They were referred to briefly by Mr. Justice Harlan in his opinion, and dismissed as follows:

“The former adjudications of this court upon which counsel mainly rely, did not declare any different doctrine, or justify the conclusion for which defendants contended.”

The court, in the Louisiana Gas Light Company case (115 U. S.), in referring to the Slaughter House cases, said:

“So far from the court saying that the State could not make a valid contract in reference to any matter within the reach of the police power, according to its largest definition, its language was: ‘While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power,’ we think that in regard to two subjects so embraced, it can not by contract limit the exercise of those powers to the prejudice of the general welfare. They are the public health and the public morals.”

It will not do, therefore, in view of the repeated decisions of this court, to say that no valid contract can be made by a State, or by a city representing a State, which in any manner encroaches upon the police power. The

books are full of cases to the contrary, and the settled doctrine of the court, as we understand it, is simply this, that a legislative contract must be held to be *ultra vires* and void, if by its terms there has been a material surrender of the legislative power to protect the State and its people, or the city and its people, in reference to the public health, the public morals and the public safety. Mr. Justice Harlan (in 115 U. S.), after citing many cases of legislative contracts that have been held valid, and which are at the same time in conflict with the police power of the State, said :

“ Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution.”

Counsel for appellants cite the case of Jackson County Horse Railroad Company *v.* Interstate Rapid Transit Railway Company (24 Fed. Rep., 307). But the question there was a very different one from that now before the court. The precise question in that case, as stated by Mr. Justice Brewer, then Circuit Judge, was—“ Had the city of Kansas the power to grant for a term of years the *exclusive* right to occupy its streets with street railroads? ” This question, the then judge, Brewer, answered in the negative. In that case reference was made to a case previously decided by the Supreme Court of the State of Kansas, Mr. Justice Brewer, then a member of that

court, delivering the opinion. In that case the only question decided was : That because the legislature had granted to the city a general control and supervision of the streets, although the legislature had not in terms made any specific grant in respect to the occupation of streets by railroads or their operation therein, the city might *permit* a street railroad.

The case of the Saginaw Gas Light Company *v.* The City of Saginaw, decided by Mr. Justice Brown, then Circuit Judge, in the United States Circuit Court for the Eastern District of Michigan, September 7, 1886 (28 Fed. Rep., 329), is also cited by counsel for appellants. But the real facts in that case, as well as the principles laid down, scarcely warrant its citation as an authority in this case. In that case, the city charter simply authorized the municipality "*to cause its streets to be lighted.*" This was the *sole* legislative power conferred upon the municipality by the State in reference to that subject. A contract, however, was made by the city, giving the Saginaw Gas Light Company an *exclusive* privilege to light the city *for a period of thirty years*. The court, very properly, held the contract was *ultra vires*.

The case of the City of Brenham *v.* Brenham Water Company (67 Texas, 542: 4 S. W. Rep.), cited by counsel for appellants, can have no controlling influence in this case. The contract in that case was held to be in conflict with a provision of the State Constitution, which reads as follows :

"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

Nor has the rule as laid down in the *Spring Valley Water Works v. Schattler* (110 U. S., 347) any application to the case at bar. All that was decided in that case was that the municipality of San Francisco possessed the legislative power to fix the price of gas and water, unless prohibited by constitutional limitation or a valid contract obligation; the court holding in that case there was no valid contract.

The case of *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. & F. G. Co. et al.*, decided in the Circuit Court, Western District of Michigan, opinion by the late Circuit Judge Jackson (33 Fed. Rep., 659), and cited by counsel for appellants in their brief, page 33, can have no possible application to the case at bar.

In that case a city charter gave the council power "to make, amend, and repeal" any ordinance "deemed desirable for lighting the streets, and taking charge of them," but did not confer in express terms *exclusive* power over them; it was held that it did not by *implication* give the city control of the streets to the exclusion of the sovereign power of the State, and that an ordinance granting exclusive use of the streets for wires and poles for electric lights for fifteen years was *ultra vires*, and void.

The question decided by the Supreme Court of Oregon in case of *Parkhurst v. City of Salem* (32 Pac. Rep., 304), and cited in brief of counsel for appellants, was that a city, under a grant of exclusive power "to permit, allow, and regulate" the laying of tracks for street cars, has not

the power to grant for a term of thirty years the *exclusive* right to occupy its streets with street railroads. The case, therefore, has no bearing on the case at bar, the facts being radically different.

Counsel for appellants cite the case of *Gale v. Kalamazoo* (23 Michigan, 343), opinion by Judge Cooley, and seem to place great reliance on it as supporting their theory in this case. A critical examination, however, will show the facts of the cases to be wholly different. And one sentence in Judge Cooley's opinion shows, conclusively, that had there been in the agreement in that case a stipulation on the part of the city authorizing the city to purchase the market house, which Gale contracted to build, as in the case at bar, the court would not have held the hands of the city were tied, or the contract, therefore, *ultra vires*.

In that case, Gale, the plaintiff, in pursuance of certain charter powers, contracted with the city of Kalamazoo to erect a commodious market house, to be known as the "*Kalamazoo Public Market*." The same, when completed, was to be placed under the control of the city authorities for the term of ten years. The stalls were to be rented on such terms *as might be agreed on by Gale and the city authorities*, and the rents paid over to Gale quarter-annually. It was stipulated that "during the continuance of this contract there shall be no other public market house in said village, provided said market house shall prove large enough to accommodate the public for the purposes aforesaid." There was no

provision, however, reserving to the city the option of purchasing said market house, or condemning it; there was a stipulation that all marketable products of the city offered for sale should be confined to said market house.

The court held this contract *ultra vires*, as having divested the city of a portion of its legislative powers.

But Judge Cooley, in his opinion, said :

“And had the village, in this instance, contracted to pay the plaintiff for his market building when constructed, or for the rent thereof, the questions before us could not have arisen.”

It will be further borne in mind, this case was decided in 1871, more than twenty-seven years ago. Since then, the rulings of this court on this and kindred questions relating to legislative contracts, defining police powers of municipalities, and the extent to which such power may be invaded by legislative contracts, have established the law on lines somewhat different from those recognized by Judge Cooley.

The Town of Westerly Case.

In former brief on part of appellee, the cases of “The Seaman’s Friend Society *et al.* v. Town of Westerly,” and Seaman’s Friend Society *v.* Same, in which Judge Carpenter, then United States District Judge, District of Rhode Island, granted a preliminary injunction, were cited. (See former brief, pp. 60–62.)

Since the preparation of that brief, these cases of Westerly (*supra*) were passed upon in the Circuit Court for the District of Rhode Island, District Judge Brown delivering the opinion. They were tried together as one. The case, as reported in 80 Fed. Rep., 612, is cited by counsel for appellants in their brief, page 36.

From a careful examination of the opinion in this case, it will be seen, the case as there finally decided, so far from sustaining the contention of counsel for appellants upon any of the points involved in this case, is just the reverse.

In that case the complainant based its claim of right to preclude the town of Westerly from constructing water works—

First. Upon a vote by the *town council* under a certain section 32, chapter 425, of the Public Laws of the State of Rhode Island, conferring certain powers, not upon the "*town*," but upon the "*town council*."

Second. Upon certain alleged acts of the town, under a certain other act, chapter 285 of the Public Laws of the State of Rhode Island, conferring certain powers on "*towns*," which it was claimed had the effect of *adopting* and *ratifying* the act of the "*town council*."

The section of the chapter 425, under which complainant claimed an exclusive right, is as follows:

"*Section 32.* The '*town council*' of any town, or the city council of any city, may grant to any person or corporation the right to lay water pipes in any of the public highways of such town or city for the supplying the

inhabitants of such town or city with water, and may consent to the erection, construction and the right to maintain a reservoir or reservoirs within said town or city, for such time and upon such terms and conditions as they may deem proper, including therein the power and authority to exempt such pipes and reservoirs, and the lands and works connected therewith from taxation."

The court held that under this grant of power the "*town council*" had no power to grant to the Westerly Water Works Company any *exclusive rights*; and further, the court found as a fact (I quote from the opinion), that there "*is no express agreement,*" as in the case at bar, "*that the town will not compete, nor that in case it should elect to compete, it would purchase the works.*"

The Westerly Water Works Company v. The Town of Westerly, 80 Fed. Rep., page 617.

The provision of chapter 285 of the Public Laws of Rhode Island, conferring certain powers upon the "*towns*" of that State, as contradistinguished from power conferred on the "*town councils*," and under the former of which it was claimed there had been by certain votes and acquiescence, an *approval* and *ratification* of the grant made to the complainant by the "*town council*," reads as follows:

"*Section 1.* Whenever the electors of any town, qualified to vote upon questions of taxation, or involving the expenditure of money, shall have voted, at a town meeting called for that purpose, to provide a water supply for the inhabitants of such town, or for some part thereof; or whenever any town shall enter or shall have entered into any contract with any person or corporation to furnish such town with such a water supply (a contract

which towns are hereby authorized to make), then such town, or the person or corporation bound to fulfill such contract, as the case may be, may take, condemn, hold, use, and permanently appropriate any land, water, rights of water and of way necessary and proper to be used in furnishing or enlarging any such water supply, including sites and materials for dams, reservoirs, pumping stations, and for coal houses, with right of way thereto, and right of way for water pipes along and across public highways and through private lands, and including also lands covered or to be flowed by water, or to be in any other way used in furnishing, enlarging, or maintaining any such water supply."

The court held, however, there had been no ratification of the grant made by the "*town council*," by any acquiescence or acts of the "*town of Westerly*," under this chapter 285. And while not deciding the question as to whether under this chapter 285 a "*town*" has power to *preclude itself by contract from competing with the company holding the right to construct such works*, it is clearly apparent from the opinion of the court, taken as a whole, that the court would have held such power existed had it been necessary to pass upon that question in that case.

And, at the risk of being tedious, I beg to quote upon this point the following, from the opinion of the court, as rendered by Brown, District Judge, in that case:

"An important difference exists between this statute (ch. 285) and chapter 425, previously considered. The town is authorized by this statute *to contract with any person or corporation for a water supply* 'for the inhabitants of such town, or for some part thereof.' This is obviously a *different power* from that of the town council, under chapter 425, to grant permission to lay pipes and to vend water, subject to indefinite competition."

The court proceeding, after referring to a doubt expressed by his predecessor, Judge Carpenter, as to whether any *exclusive* privilege could be granted under this chapter 285, says:

"Although such doubt exists, we think there is great force and weight of reason in the contention of the plaintiffs, that chapter 285 *does confer upon the town the power to make a binding agreement with the company for a full supply of water for the town and its inhabitants, and, as a part of such contract, to give to the company, as reasonable security for compensation for its original outlay, an agreement that the town will not, during the period of twenty-five years, compete with the company so long as it furnishes a proper and adequate supply of water of a suitable quality, where such an agreement is accompanied by an agreement upon the part of the company that it will sell to the town its property at a fair price, to be fixed by arbitration.* The reasonableness of such a contract might, however, be questioned, if the town were called upon to pay a sum to compensate the company for the loss of an *exclusive* franchise in addition to the value of its works. To bind the town to pay the company the value of an exclusive franchise might be said to amount to conferring an *exclusive* franchise. By retaining the right to recall the powers granted to the company upon repayment to it of the amount of its investment" (this, the court will perceive, was the precise thing that was stipulated for in the contract now under consideration), "the objection that the hands of the public are tied, and that its discretionary powers as to making further improvements are impaired, is obviated, at least to a great extent. The contract, then, can not, in strictness, be called an exclusive contract, since the exclusiveness is only upon a reasonable condition. We think, therefore, that a sound distinction can be made between a grant or a contract which absolutely excludes all competition, and one which merely excludes the competition of the town until it shall make due compensation to the company. And there is authority for such a distinction in

the cases cited for the complainants: Walla Walla Water Company v. The City of Walla Walla, 60 Fed. Rep., 957; Fergus Falls Water Company v. Fergus Falls, 65 Fed. Rep., 586; Illinois Trust and Savings Bank v. City of Arkansas City, 22 C. C. A., 171; 76 Fed. Rep., 271."

The court, proceeding further in the case of the Westerly Water Works Company (*supra*), refers specifically to this very case of the Walla Walla Water Company v. The City of Walla Walla and to the decision made in the Circuit Court, and points out very clearly the distinction between the contract in the case at bar and the one in the case of the town of Westerly, as follows:

"It appears, however, upon examination of the case of The Walla Walla Company v. The City of Walla Walla (60 Fed. Rep., 957), that the city in *explicit terms* agreed not to erect, maintain or become interested in any other water works, save under conditions not material to this decision, and it is also stated that the city had bound itself to take over the plant and render just compensation whenever it did elect to furnish water by means of works owned by it. In the present case there is *no express agreement* that the town will not compete, nor that in case it should elect to compete it will purchase the works. Such agreement must be deduced from construction, and in view of the rule that all doubt in the construction must be resolved against the company and in favor of the public, there is great difficulty in inferring such agreement."

Westerly Water Works Company v. Town of Westerly, 80 Fed. Rep., 611.

The cases of Westerly Water Works v. Town of Westerly and Seaman's Friend Society v. Town of Westerly were decided first by United States District Judge Carpenter, then District Judge in the Circuit Court of the

District of Rhode Island, June 30, 1896, in which he fully sustained the views for which we are now contending. Judge Carpenter concluded his elaborate opinion in the case as follows :

"On the whole, the enterprise in which the town of Westerly has embarked seems to me to be no less a project, without any plausible excuse, to confiscate the property of these complainants, and the argument of the town on these motions seems to me to be an attempt to show that this project can be carried to completion under the forms of law. To such an argument I am not inclined to give any greater weight than that to which it is entitled under pointed rules of law and pointed rules of decision. The injunction will issue in both cases."

75 Fed. Rep., 193.

Appellant's Counsel's Summary of objections to contract.

Counsel for appellants summarize in their brief (pages 24-25) four objections to the validity of the contract with the Water Company, as follows :

- (1) "The contract creates a monopoly, which in the absence of an express grant from the legislature of power so to do, or such power necessarily implied, is void, as in contravention of public policy.
- (2) The contract is void as an attempt to contract away a part of the governmental power of the city council.
- (3) The contract is void as creating an indebtedness in excess of the charter limit.

(4) The contract is in violation of the express provisions of a general statute of the Territory of Washington."

These objections will be considered, briefly, in their order.

I.

Does the contract create a monopoly?

This is fully answered in the negative in former brief of appellee (pages 33-24), and authorities there quoted.

New Orleans Gas Company *v.* Louisiana Light Company, 115 U. S., 650;

New Orleans Water Works Company *v.* Rivers, 115 U. S. 674;

Louisville Gas Company *v.* Citizens' Gas Company, 115 U. S., 683;

Crescent City Gas Light Company *v.* New Orleans Gas Light Company, 27 La. Ann., 138;

The State, *ex rel*, etc., *v.* The Cincinnati Gas Light and Coke Company, 18 Ohio, St. Rep., 291.

See, also, *supra*, this brief.

II.

Is the contract void, as an attempt to contract away a part of the governmental power of the city council?

This contention was anticipated and fully met in former brief (pages 40-43); also pages 46, 47, and authorities there cited.

See, also, pages *supra* of present brief.

III.

Is the contract void, as creating an indebtedness in excess of the charter limit?

This contention was also fully met and answered in the former brief (pages 65-106). Counsel evidently lacks confidence in this objection, judging from the slight attention it receives in their brief.

But, since writing the former brief, I have discovered that this question has been settled for this court by a decision of the Supreme Court of the State of Washington, as will be seen by the following extract from the opinion of Judge Hanford, in the case of *Moore v. The City of Walla Walla* (60 Fed. Rep., 962, *supra*).

In that case, Judge Hanford, among other things, said :

"The other grounds relied upon, to which no allusion is made in my opinion in the preceding case, are also insufficient. The point made, that the limitation upon the power of the city to incur a debt, contained in the 105th section of its charter, has not been repealed by the general laws of this State, fixing a different and more liberal measure, has been passed upon by the Supreme Court of this State, in the case of *Yesler v. City of Seattle* (1st Washington St. Rep., 308; 25 Pac. Rep., 1014). That decision bears directly on the point, holding that the general laws of the State, fixing the limitation of indebtedness which may be incurred by municipalities, apply to cities holding charters granted by special acts of the territorial legislature, as well as to cities incorporated under the general laws of the State."

IV.

Is the contract in violation of the express provisions of any general statute of the Territory of Washington ?

This is a point suggested here for the first time. Nothing of the kind was intimated in the court below. The labors of the present counsel, in their tremendous effort to find some instrument with which they can successfully assail the contract with the water company, have resulted in the discovery of this very obscure point.

The proposition is : That the general act of 1881, entitled "An act authorizing cities, incorporated towns, and villages to provide for the supply of water" (Session Laws of the Territory of Washington, 1881, p. 24), was not repealed, if indeed it ever became a valid act, as to the city of Walla Walla, by the special act entitled, "*An act to incorporate the city of Walla Walla, and to particularly define the powers thereof*," approved November 28, 1883, and which went into effect January 1, 1884, and under which the contract in question here was made, but that the same must stand, be read into, and become a part of it.

Such a proposition, it is confidently submitted, would be a reversal of the plainest and well-settled principles of statutory construction.

It is conceded by counsel that the true rule is that legislation, as to a *special subject or locality*, supersedes prior *general legislation*. But it is contended that this

rule only obtains where the special act covers everything in the general act. Applying this rule, even with its qualification, as stated by counsel, which by the way is quite too broad, it is clear the act of 1881, and all its provisions, in so far as they apply to the city of Walla Walla, were repealed by the special act of November 28, 1883.

Counsel admit "if the special charter covered any one of the many details of the general act of 1881, then it might be contended that as to that point the general act was repealed," and yet an inspection of the special charter of 1883 will disclose the fact that it covers substantially nearly every one of the details, in regard to providing a water supply for the city, found in the general act of 1881.

But it is clear, not only from the several provisions of the two acts, but also from the title of the special act of 1883, and also the repeal clause in that act, that it was the intention of the legislature to first *define* in that special act *all the powers which the city should be permitted to exercise*, and to *repeal all acts or parts of acts conferring any powers*, or having any reference whatever to the city of Walla Walla.

The title of the special act of 1863 is not only "to incorporate the city of Walla Walla," but also "*to particularly define the powers thereof*," while section 106 of the special act of 1883 has the following repealing clause :

"*Sec. 106. All acts and parts of acts relating to the incorporation of Walla Walla City, and not herein reserved, are hereby repealed.*"

A reference, moreover, to section 103 of the charter (act of November 28, 1883) declares affirmatively that "the powers * * of the city of Walla Walla * * shall be those prescribed in this act."

The section reads—

"The rights, powers and duties, and liabilities of the city of Walla Walla, and of its several officers, *shall be those prescribed in this act*, and this act is hereby declared a *public act*."

Surely, in view of these several provisions, it can not be successfully claimed that the city, or its officers, can exercise any *other* powers than those granted, express or implied, by this act of 1883.

The old maxim, *expressio unius exclusio alterius*, is applicable here.

It is, furthermore, a matter of very grave doubt whether this general act of 1881 ever became operative. Section 8 of the act provides as follows:

"This act, when approved by the Governor of this Territory, shall be in force upon its *approval or ratification by the Congress of the United States*."

It is conceded by counsel for appellants, in their brief, that this act never was either approved or ratified by any *affirmative* action by The Congress of the United States.

Injunction is the appropriate remedy.

Counsel for appellants make claim in their brief that conceding the acts which are complained of are well pleaded and are sufficient to come within the constitu-

tional provision, still the court is without jurisdiction as to *subject-matter*. In other words, the claim is made that it is not such a case as a court of equity will take cognizance of.

It is not believed, in view of the facts disclosed in this case, that this court will hesitate in promptly holding, provided the contract with the Water Company is held to be valid, that the remedy by injunction to restrain the execution of the unconstitutional act of the city is the only complete remedy. There is not, nor can there be, any complete remedy at law for such a ruthless and unjustifiable invasion of the constitutional rights of the appellee, which, unless restrained, will result in *changing the terms of the contract*, and thus *impair its obligations*, but also in a virtual annihilation of all vested values of their property. (See former brief, pages 53-57.)

The acts of the city operate clearly to impair the obligations of appellee's contract.

Counsel for appellants, in their elaborate brief (page 23), *querie* that there is no sufficient averment in the pleadings to show any impairment of the obligation of the contract. A careful examination both of the complaint and answer will set at rest this *querie*. The complaint (Record, 10-13) avers:

First. The passage by the city in due form of an ordinance making full provision for the erection of extensive water works, authorizing and directing for such purpose the issue by the city of bonds to the amount of

\$160,000, and directing their sale "upon the most advantageous terms," no other limit, and the proceeds paid into the city treasury to the credit of a fund to be known as the "City Water Fund." This ordinance further provides for the levy of a tax upon the taxable property of the city sufficient to pay the interest on such bonds. The ordinance further provides for a sinking fund to meet the principal of the bonds at maturity. It further provides for a special election to ratify the same, as provided by the charter act approved February 10, 1893. It provides, further, this ordinance should take effect immediately on its being published in the official paper for five days consecutively. (Record, 10-13.)

The complaint further shows such special election was held, and the issue of the bonds and the erection of the water works authorized by the necessary vote. The complaint further avers that the city and its officers claim and insist that the complainant's contract with the city is not a valid or binding contract, "neither in respect to stipulation binding the city not to erect, maintain or be interested in any system of water works, other than those of plaintiff, nor in respect to the stipulation for the furnishing of water to the city by this plaintiff and the compensation to be paid therefor; and said city and said officers refuse to be bound by said contract or to observe the same." (Record, 13.)

The complaint further avers, distinctly, that the said city, regardless of the rights of complainant under said contract, "are proceeding to borrow money to erect and

maintain water works, as in and by the ordinance last above set out provided, and have advertised the municipal bonds of the said city to the amount of \$160,000 for sale on the 30th day of January, 1894, for the purpose of erecting and maintaining said water works, and threaten, and will on said day, unless restrained by this honorable court, sell said bonds and apply the proceeds to the erection of water works for supplying of the inhabitants and consumers of the city with water for reward and compensation, and will become a competitor with plaintiff for the trade or custom of said inhabitants or consumers." (Record, 13.)

The complaint further avers that the said city of Walla Walla "is now, and for some time last past has been, expending large sums of money for a water supply, and for the improvement of the same, and for preliminary work in connection with its proposed system of water works, and is continuing to make such expenditures, and will continue to do so, and threatens to and will commence erection of said system of water works at a large expense, if it shall sell its bonds for said purpose, and threatens to and will prosecute said work to a completion, and will become a competitor with plaintiff for the trade and custom of the consumers of water in the city of Walla Walla, as soon as said work shall have been completed." (Record, 13-14.)

The complaint further avers "that the value of its property is largely dependent upon the fact of its having no competition in the city of Walla Walla, and particularly no competition *from* the city of Walla Walla, and

on the fact of its contract right to be free from competition by the city of Walla Walla during the life of its contract." (Record, 13-14.)

Various other averments of like character, showing the manner in which the obligations of plaintiff's contract will be impaired, unless the city is restrained, will be found in the complaint. (Record 14-16.)

The answer of the city first assails the validity of the contract with the Water Company, and denounces it as *ultra vires*. The answer admits, not only by the failure to deny, but by *affirmative declaration*, every one of these averments in the complaint. (Record, 20-27.) Especially does it state that it refuses to be bound by its agreement to not erect water works of its own. (Record, 25.)

Any act which varies the terms of a contract without the consent of all parties to it, or which destroys rights vested under and in pursuance of the terms of a contract, impairs the obligation of such contract.

B. & P. R. R. Co. v. Nesbitt *et al.*, 10 How., 390.

It is one of the obligations of the contract that the city will not erect water works, or become interested in any, except upon certain important conditions, namely, the purchase of the company's works; and now the city ignores all these conditions, thus breaking faith with the company, impairing the obligations of the contract, and rendering the water company's property in the contract, as also the plant—which is the result of large investments—under this contract worthless.

On this question see former brief on part of appellee, pages 55-57; also pages 62, 63, and authorities there cited.

It is quite true, ~~and~~ ^{as} stated by this court in *Curtis v. Whitney* (13 Wall., 68): "Nor does every statute which affects the value of a contract impair its obligation;" but it is equally true when the value of a contract is affected injuriously by reason of the fact that the *terms of the contract* have been changed without consent, then there is such an impairment of the obligation of the contract as is contemplated by the use of that phrase in the Constitution.

The Ordinance passed by the city June 20, 1893, is valid, and was authorized by the act approved ~~July~~ ^{July} 10, 1893. The facts are properly averred in complaint.

Counsel for appellants say in their brief (page 14), that there is no sufficient averment in the pleadings to show that the city of Walla Walla had the power, under any authority from the State, to enact the ordinance approved June 20, 1893, providing for the issue of bonds and erection of water works.

While conceding the correctness of the rule, as stated by counsel, that it must appear from the pleadings that this power existed, it is respectfully insisted this does appear *affirmatively* and *positively*, both in complaint and answer. In the complaint the ordinance is set out *in hac verba*, and the *public act* of the legislature confer-

ring authority is referred to in the ordinance, both by title fully expressed and date of approval, as follows:

"The city of Walla Walla does ordain as follows:

"Whereas, the city council of said city of Walla Walla deem it advisable that the said city shall exercise the authority conferred upon them in relation to water works, under and by virtue of an act of the legislature of the State of Washington, entitled, 'an act relating to and authorizing cities and towns to purchase, construct and maintain water works, systems of sewerage, gas and electric light plants, and to issue bonds to pay therefor, and declaring an emergency, approved February 10, 1893:

"Now, therefore, the city of Walla Walla does ordain as follows."

Then follows the ordinance at length. (Record, 10-13.)

The answer (Record, 24) says:

"We admit that the city of Walla Walla, on the 20th day of June, 1893, passed, and that on the same day the mayor of said city approved, the ordinance set forth in complainants' bill of complaint."

This, it will be observed, is not a *private* but a *public* act, an act, therefore, all the provisions of which the court below, as well as this court, will take judicial knowledge of. (Session Laws, Legislature of the State of Washington, 1893, pp. 12-14.)

By a reference to the act of February 10, 1893 (Session Laws of Washington, 1893, pp. 12-14), under which the ordinance was passed by Walla Walla City authorizing the issuance of bonds and the erection of water works, in section one, it will be seen, the city of Walla Walla has full power, clearly expressed, to do everything the city did do under it, by the passage of the ordinance of

date June 20, 1893 (Record, 10), and, further, that in all respects such ordinance conforms to the requirements of said statute. (Record, 10-13.)

It is respectfully submitted, as both title and date of approval of act (coupled with the fact that it is a public act of the legislature) were set out in the bill of complaint, the averment as to the power of the city to pass the ordinance was all that was required. The facts as pleaded are the equivalent in all respects as a pleading to one in which the act of the legislature is set out at length, while the former is much the better form.

June 20th 1893
The ordinance of ~~March 10, 1887~~, is a law of the State within the meaning of the Constitutional clause that no State shall pass any law impairing the obligation of contracts.

In support of this proposition, see former brief (pp. 49-53), also the following :

In *New Orleans Water Works v. Louisiana Sugar Company* (125 U. S., 31), this court, opinion by Mr. Justice Gray, said :

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may be properly considered as a law within the meaning of this article of the Constitution of the United States."

Estoppel.

In addition to other matters of estoppel hereinbefore referred to in this, and also in former brief, it should be borne in mind the city of Walla Walla availed itself of the benefits of its contract with the Water Company from March 19, 1887, until June 20, 1893, a period of six years and three months; and, so far as the record shows, during all that time made no complaint, therefore, while ordinarily no amount of ratification or acquiescence can make an *ultra vires* contract valid, the city should not now be permitted to repudiate its contract. As between the city and the Water Company, it should be regarded and treated—whatever might have been the lack of power in the first instance—as a contract so far consummated and recognized by the city, *by the receipt of benefits under it for so long a period of years*, that the city is now *estopped* from denying its validity, or impairing its obligation. And it follows in this view of the case, the obligations of the contract are equally within the protection of the Constitution of the United States, as though the power to make the contract was unquestioned.

Bearing on this view of the case, the case of Fergus Falls Water Company *v.* City of Fergus Falls, in the Circuit Court for the District of Minnesota, Nelson, District Judge (65 Fed. Rep., 586), is directly in point.

In that case, under a charter with powers more restricted than are those of the Walla Walla charter, the city of Fergus Falls contracted with the assignor of the

plaintiff, giving him and his assignee exclusive privilege of laying water mains in the city for thirty years, and providing that he should furnish the city with fifty-five fire hydrants, at a rent annually of \$80 each, for the thirty years, with a stipulation that at the end of ten years the city might, at its option, buy the water works, and also stipulating that no similar privilege should be granted to any other person, firm, or corporation, and further, that the city would not, during this period of thirty years, erect water works of its own. The water works were erected under this contract and operated for ten years, when the city passed an ordinance declaring the contract null and void.

In a suit to recover rent of hydrants, as per terms of contract, Judge Nelson said :

"The only question is, is this ordinance so unreasonable so oppressive, so contrary to public policy, that the law will interfere and declare it void? I am of the opinion that if this question had been raised at the outset, it is doubtful whether the city council had authority to give an exclusive contract of this character to any person for the purpose stated; but as plaintiff's assignor, relying upon the ordinance, in good faith invested a large sum of money in these works, and the city has for ten years enjoyed the benefits thereof, without objection or complaint, and has now the opportunity of purchasing the works at a reasonable valuation, I do not consider that the ordinance is so unreasonable, oppressive, or contrary to public policy as to be void. Where a contract is sought to be avoided on the grounds above stated, it must be treated as a nullity by the party seeking to avoid it, and must be repudiated in toto. He can not repudiate it and at the same time reap any of the benefits derived from it, as the defendant has attempted to do."

Fergus Falls Water Company v. Fergus Falls City,
65 Fed. Rep., 591.

Counsel in their brief (page 23) say :

"It will be observed that no denial or refusal of the annual rent of \$1,500 has ever been made."

How this is I am unable to say, as the record in that regard is silent. But assuming the fact to be as suggested by counsel, then we have the remarkable and still more aggravated case of the city *repudiating* the contract *in part*, and *recognizing* it as *valid in part*; *denouncing* it as *ultra vires*, in so far as by its express terms the city is inhibited from becoming a competitor, and embracing and *recognizing* it as *valid* in so far as the company is compelled to furnish the city with water for the sum specified in the contract for the nineteen years of the contract term that remained when the obligation of the contract was assailed, and for the fourteen years now unexpired.

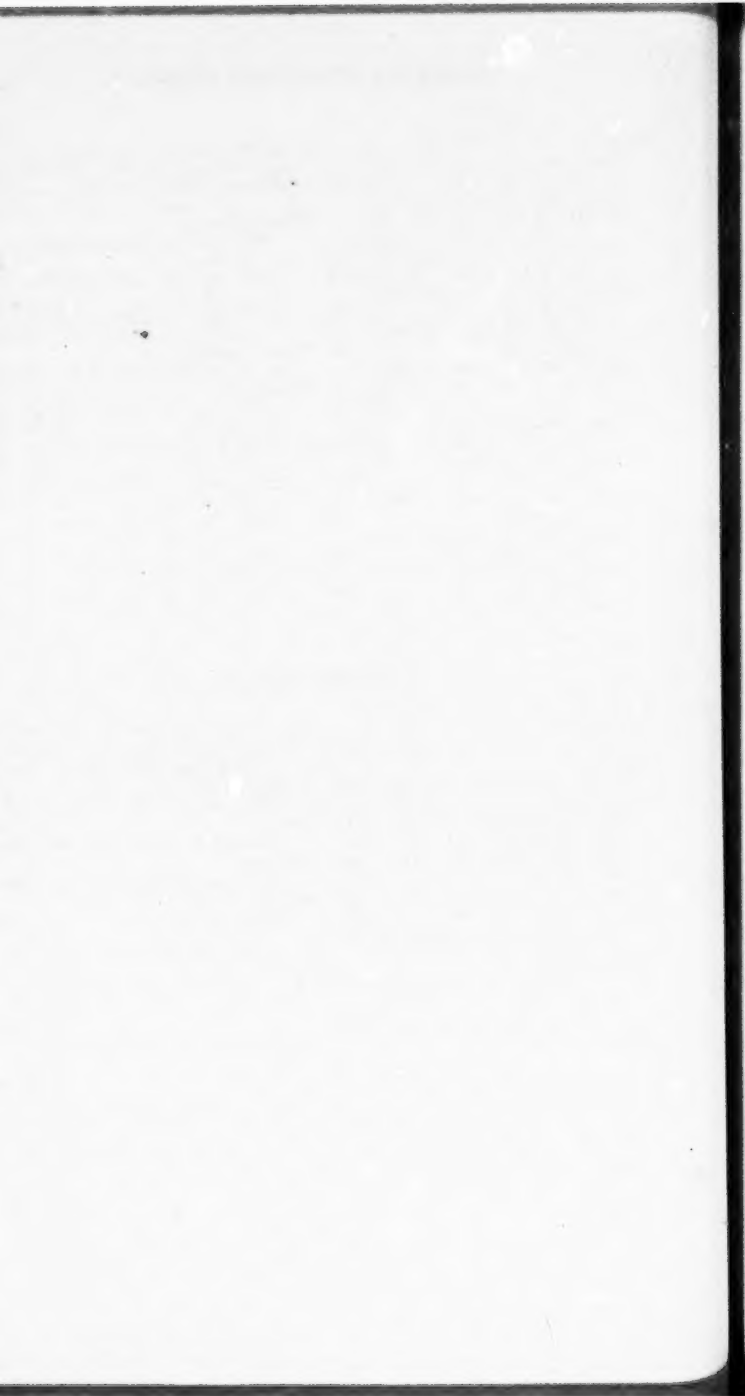
In other words, if this suggestion of counsel is true, then the city is attempting to break down the barriers in its contract so as to enable it to compete with the water company in furnishing the *inhabitants* of the city with water, and at the same time holding on to the contract compelling the water company to furnish the *city* with water for the mere pittance of \$1,500 per annum specified in the contract.

Is it not apparent to all that the water company would never have covenanted to furnish *the city* with water for twenty-five years, for such a nominal sum, had it not been for the covenant of the city that it would not become a competitor in furnishing the *inhabitants* of the city with water?

Whatever view is taken of this case—from whatever standpoint the action of the city is considered—it is presented in a most unenviable light. Were an individual, a natural person, to treat the obligations of his solemn written contract in a manner such as this city has treated its contract obligations, he would be universally denounced as destitute of moral responsibility. The act, however, is no less reprehensible because done by a municipal corporation.

It is respectfully insisted the decree of the court below should be affirmed.

JOHN H. MITCHELL,
Solicitor for Appellee.



CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1898.

WALLA WALLA CITY *v.* WALLA WALLA WATER
COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF WASHINGTON.

No. 23. Argued October 12, 13, 1898. — Decided November 14, 1898.

By an act of November 28, 1883, the legislature of Washington Territory incorporated the city of Walla Walla, conferring upon it, among other powers, the power to provide a sufficient supply of water for the city, and the right to permit the use of the city streets for the purpose of laying pipes for furnishing such supply for a term not exceeding twenty-five years. The act contained a further provision fixing the limit of indebtedness of the city at fifty thousand dollars. The city, under this authority, by contract granted to the Walla Walla Water Company the right to lay and maintain water mains, etc., for twenty-five years, reserving to itself the right to maintain fire hydrants and to flush sewers during this term, each without charge. The contract further provided that it was voidable by the city, so far as it required the payment of money, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of such supply, or a like failure on the part of the company to perform its agreements, and that, until the contract should have been so avoided, the city should not erect, or maintain, or become interested in other water works. These provisions were accepted by the Water Company, and were complied with by it, and the contract was in force when this bill was filed. In 1893 the city authori-

Statement of the Case.

ties passed an ordinance to provide for the construction of a system of water works to supply the city with water, and to issue bonds for that purpose to the amount of one hundred and sixty thousand dollars, which ordinance was accepted by the necessary majority of legal voters. The Water Company then filed its bill to enjoin the city from creating the proposed water works, or from expending city moneys for that purpose, or from issuing city securities therefor. To this bill the city demurred, resting its demurrer upon a want of jurisdiction, all parties on both sides being citizens of the State of Washington. *Held*:

- (1) That the allegations in the bill raise a question of the constitutional power of the city to impair the obligations of its contract with the plaintiffs by adopting the ordinance;
- (2) That the grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets of a city, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, (which may be made by municipal authorities when the right to do so is given by their charters,) in consideration of the performance of a public service, and, after performance by the grantee, is a contract, protected by the Constitution of the United States against state legislation to impair it;
- (3) That the plaintiff has no adequate and complete remedy at law, and the court has jurisdiction in equity;
- (4) That as the contract was limited to twenty-five years, and as no attempt was made to grant an exclusive privilege, the city acted within the strictest limitation of its charter;
- (5) That if the contract for the water supply was innocuous in itself, and was carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power could not be invoked to abrogate or impair it;
- (6) That the stipulation that the city would not erect water works of its own during the life of the contract did not render it objectionable;
- (7) That the objection that the indebtedness created by the contract exceeded the amount authorized by the charter was without merit, under the circumstances;
- (8) That the act of 1883, being subsequent to the general statute of 1881, authorizing cities to provide for a supply of water, was not in violation of that act;
- (9) That the city was bound to procure the nullity of the contract before the courts, before it could treat it as void.

THIS was a bill in equity filed by the Water Company to enjoin the city of Walla Walla and its officers from erecting water works in pursuance of an ordinance of the city to that effect, or from acquiring any property for the purpose of carrying out such enterprise, or from expending the moneys

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of the city, or selling its bonds or other securities for the purpose of enabling the city to erect such water works.

The facts are substantially as follows: By an act of the Territory of Washington, November 28, 1883 (Laws of 1883, 270), incorporating the city of Walla Walla, it was enacted (section 11) that the city should have "power . . . to provide . . . a sufficient supply of water;" and by section 10 "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years, . . . provided always, that none of the rights or privileges herein granted shall be exclusive, nor prevent the council from granting the same rights to others." Other sections are as follows:

"SEC. 11. The city of Walla Walla shall have power to erect and maintain water works within or without the city limits or to authorize the erection of the same, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, . . . and to enact all ordinances and regulations necessary to carry the power herein conferred into effect; but no water works shall be erected by the city until a majority of the voters, who shall be those only who are freeholders in the city, or pay a property tax therein, on not less than five hundred dollars' worth of property, shall at a general or special election vote for the same.

"SEC. 12. Said city is hereby authorized and empowered to condemn and appropriate so much private property as shall be necessary for the construction and operation of such water works, and shall have power to purchase or condemn water works already erected, or which may be erected, and may mortgage or hypothecate the same to secure to the persons from whom the same may be purchased the payment of the purchase price thereof."

* * * * *

"SEC. 22. The city of Walla Walla shall have power to adopt proper ordinances for the government of the city, and to carry into effect the powers given by this act."

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* * * * *

"SEC. 23. The city of Walla Walla shall have power to establish and regulate the fees and compensation of all its officers, except when otherwise provided, and have such other power and privileges not here specifically enumerated as are incident to municipal corporations."

* * * * *

"SEC. 24. The power and authority hereby given to the city of Walla Walla by this act shall be vested in a mayor and council, together with such other officers as are in this act mentioned, or may be created under its authority."

* * * * *

"SEC. 43. The city council shall possess all the legislative powers granted by this act."

* * * * *

"SEC. 103. The rights, powers and duties and liabilities of the city of Walla Walla and of its several officers shall be those prescribed in this act, and none others, and this is hereby declared a public act."

* * * * *

"SEC. 105. The limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars."

Pursuant to these sections of the charter, the city council, on March 15, 1887, passed "An ordinance to secure a supply of water for the city of Walla Walla," by which it granted, under certain restrictions, to the Water Company, for the period of twenty-five years from the date of the ordinance, "the right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of said city, for the purpose of furnishing the inhabitants thereof with water."

By section 4 the city reserved the right to erect and maintain as many fire hydrants as it should see fit, and, in case of fire, that the city should have all reasonable and necessary control of the water for the extinguishment thereof.

The ordinance also contained the following further provisions:

"SEC. 5. The city of Walla Walla shall pay to said Walla

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Walla Water Company for the matters and things above enumerated, quarter-yearly, on the first days of July, October, January and April of each year, at the rate of fifteen hundred dollars (\$1500) per annum, for the period of twenty-five (25) years from and after the date of the passage of this ordinance, the first quarterly payment to be made on the first day of October next (October 1, 1887).

"SEC. 6. The city of Walla Walla shall during said period, without expense for water, be allowed to flush any sewer or sewers it may hereafter construct, at such time during the day or night as the water company may determine, and under the direction and supervision of such officers as the city may from time to time designate, not oftener than once each week.

"SEC. 7. For all the purposes above enumerated said Walla Walla Water Company shall furnish an ample supply of water, and for domestic purposes, including sprinkling lawns, shall furnish an ample supply of good wholesome water, at reasonable rates, to consumers at all times during the said period of twenty-five (25) years; and this contract shall be voidable by the city of Walla Walla so far as it requires the payment of money, upon the judgment of a court of competent jurisdiction, whenever there shall be a substantial failure of such supply, or a substantial failure on the part of said company to keep or perform any agreement or contract on its part, herein specified or in said contract contained. But accident or reasonable delay shall not be deemed such failure. And until such contract shall have been so avoided, the city of Walla Walla shall not erect, maintain or become interested in any water works except the ones herein referred to, save as hereinafter specified.

"SEC. 8. Neither the existence of said contract nor the passage of this ordinance shall be construed to be or be a waiver of or relinquishment of any right of the city to take, condemn and pay for the water rights and works of said or any company at any time, and in case of such condemnation the existence of this contract shall not be taken into consideration in estimating or determining the value of the said water works of the said Walla Walla Water Company."

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The Water Company accepted this ordinance, entered into a formal contract with the city, and substantially complied with the terms and conditions of such contract — which has never been avoided by the city or by the courts, and was still in force at the time the bill was filed.

After this contract had been in force and the stipulated rentals paid for about six years, on June 20, 1893, an ordinance was passed "to provide for the construction of a system of water works" for the purpose of supplying the city and its inhabitants with water; to authorize the purchase and condemnation of land for that purpose, and the issue of bonds to the amount of \$160,000 to provide the necessary funds. Pursuant to the provisions of such ordinance an election was held whereby the proposition submitted by the ordinance was carried by a sufficient majority of the legal voters.

The answer of the defendants insisted that the contract of the city with the plaintiff was not a valid and binding contract, so far as concerned the stipulation binding the city not to erect or maintain or become interested in any system of water works other than that of the plaintiff.

A demurrer to the bill having been overruled, and a preliminary injunction having been granted pursuant to the prayer of the bill, the case subsequently went to a hearing upon the pleadings and proofs, and resulted in a decree perpetuating the injunction. From this decree defendants appealed directly to this court, pursuant to section 5 of the Circuit Court of Appeals act, allowing such appeal in any case that involves the construction or application of the Constitution of the United States.

Mr. A. H. Garland for appellants. *Mr. J. Hamilton Lewis* and *Mr. R. Garland* were on his brief.

Mr. John H. Mitchell for appellee.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

The demurrer to the plaintiff's bill rested principally upon

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a want of jurisdiction of the court in certain particulars hereinafter specified. There was confessedly no diversity of citizenship, and the case was treated by the court below as one arising under the Constitution and laws of the United States.

1. The jurisdiction depends specifically upon the allegation in the bill that defendants insist that the contract of the city with the plaintiff was not a valid and binding contract, either in respect to the stipulation binding the city not to erect, maintain or become interested in any system of water works other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by the plaintiff; and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the plaintiff for the trade and custom of the consumers of water; that the plaintiff is the owner of property in the city of the value of \$125,000, and pays taxes to the city on the same; that if the city is permitted to borrow money and apply the same to the erection of water works, the indebtedness will become a cloud and burden upon all taxable property in the city, and that such loan is inequitable, and imposes upon the taxpayers a large and unnecessary burden; that the value of plaintiff's property is largely dependent upon the fact of its having no competition, and that the threatened action of the city has greatly diminished the value of such property and the credit of the company, and that it finds itself without the ability to borrow money to make the necessary additions and repairs to its property; and, in short, that the proposed action of the city is in fraud of plaintiff's rights under its contract with the city, and the protection guaranteed to it under the Constitution of the United States.

These allegations, upon their face, raise a question of the power of the city to impair the obligation of its contract with the plaintiff by the adoption of the ordinance of June 20, 1893. The argument of the defendant in this connection is that the action of the city in contracting with the Water Company, and in passing the ordinance of 1893 providing for the erec-

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tion of water works, was not in the exercise of its sovereignty ; that in these particulars the city was not acting as the agent of the State, but was merely exercising a power as agent of its citizens, and representing solely their proprietary interests ; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizens and nowise as the agent of the State ; and, therefore, that neither the State nor the city as its agent can be charged either with the making or the impairing of the original contract ; that for these reasons the Constitution of the United States has no application to the case, the Federal court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by a citizen of the State of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy.

It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as the agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry this distinction a step farther, and to hold that, if a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the State or its authorized agent, but one of an ordinary breach of contract by a private party, and hence the case does not arise under the Constitution and laws of the United States, and the court has no jurisdiction, unless there be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the

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court, or the application of the contract clause, may admit of considerable doubt, if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138, 147.

It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the Supreme Court of Ohio in *State v. Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262, 293: "And assuming that such a power" (granting franchises to establish gas works) "may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation, clearly invested, for police purposes, with the necessary authority." This case is directly in line with those above cited. See also *Wright v. Nagle*, 101 U. S. 791; *Hamilton Gas Light & Coke Co. v. Hamilton*, 146 U. S. 258, 266; *Bacon v. Texas*, 163 U. S. 207, 216; *New Orleans &c. Co. v. New Orleans*, 134 U. S. 471.

The cases relied upon by the appellant are no authority for the position assumed, that the Federal court has no jurisdic-

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tion of a case wherein the charter of a water company is alleged to have been impaired by subsequent legislation. In several of these cases the actions were for negligence in the performance of certain duties which the court held to be public or private, as the case might be. *New Orleans v. Abbagnato*, 23 U. S. App. 533, 545; *Maximilian v. Mayor*, 62 N. Y. 160; *Western College v. Cleveland*, 12 Ohio St. 375. In *Safety Insulated Wire & Cable Co. v. Baltimore*, 25 U. S. App. 166, a contract to put electric wires under ground was held to be for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the State at large, and that with reference to such contracts the city must be regarded as a private corporation. The contract was held to be one into which the city could lawfully enter, but no question of jurisdiction was made. In *Illinois Trust &c. Bank v. Arkansas*, 40 U. S. App. 257, the power to contract for water works was held to be for the private benefit of the inhabitants of the city, and that in the exercise of these powers a municipality was governed by the same rules as a private corporation, but the jurisdiction of the case was apparently dependent upon citizenship.

We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States. Granting that in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter. We do not say that this question might not become a serious one; that, with respect to a particular contract, the municipality might not stand in the character of a private corporation; but the cases wherein the charter of a gas or water company have been treated as falling within the constitutional

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provision, are altogether too numerous to be now questioned or even to justify citation.

2. The argument which attacks the jurisdiction of the court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction, goes rather to the sufficiency of the pleading than to the jurisdiction of the court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing water works, the value of those of the plaintiff company would be materially impaired, if not practically destroyed. The city might fix such prices as it chose for its water, and might even furnish it free of charge to its citizens, and raise the funds for maintaining the works by a general tax. It would be under no obligation to conduct them for a profit, and the citizens would naturally take their water where they could procure it cheapest. The plaintiff, upon the other hand, must carry on its business at a profit, or the investment becomes a total loss. The question whether the city should supply itself with water, or contract with a private corporation to do so, presented itself when the introduction of water was first proposed, and the city made its choice not to establish works of its own. Indeed, it expressly agreed, in contracting with the plaintiff, that until such contracts should be avoided by a substantial failure upon the part of the company to perform it, the city should not erect, maintain or become interested in any water works except the plaintiff's. To require the plaintiff to aver specifically how the establishment of competing water works would injure the value of its property, or deprive it of the rent agreed by the city to be paid, is to demand that it should set forth facts of general knowledge, and within the common observation of men. That which is patent to any one of average understanding need not be particularly averred.

3. The objection that a court of equity has no jurisdiction, because the plaintiff has a complete and adequate remedy at law, is equally untenable. Obviously it has no present remedy at law, since the city has done nothing in violation of its

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covenant not to erect competing water works and the Water Company has as yet suffered no damage. It is true that after the city shall have gone to the great expense of erecting a plant of its own and of entering into competition with the plaintiff company, the latter would doubtless have a remedy at law for breach of the covenant. In the meantime great, perhaps irreparable, damage would have been done to the plaintiff. What the measure of such damage would be exceedingly difficult of ascertainment and would depend largely upon the question whether the value of the plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with the business of the plaintiff.

This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Boyce's Executors v. Grundy*, 3 Pet. 210, 215; *Ins. Co. v. Bailey*, 13 Wall. 616, 621; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Tyler v. Savage*, 143 U. S. 79, 95.

Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction. In such a case as this, the remedy will save to one party or the other a large pecuniary loss — to the city, if it be obliged to pay to the plaintiff damages occasioned by the establishment of its competing works; — to the plaintiff, if it be adjudged that the city has a right to do so.

But it is further insisted in this connection that, under section 8 of the contract, the city had the right at any time to take and condemn the water works of the company, and that, in case of such condemnation, the contract should not be taken into consideration in estimating the value of the water works;

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and hence, that if the city elected to establish water works of its own, without condemning those of the plaintiff company, the value of such water works would furnish the proper measure of damages in such action. This argument necessarily assumes, however, that the damages in such action would be the same as in a proceeding for condemnation. Perhaps if the plaintiff company were forced to abandon its works entirely by the competition of the city, the value of such works might furnish the measure of its compensation; but it could not be forced to do this, and if the company elected not to abandon, but to enter into competition with the city, the damages would have to be estimated by the probable injury done to the company by such competition. This, as above indicated, would furnish a most uncertain basis.

4. The case upon the merits depends largely upon the power of the city under its charter. The ordinance authorizing the contract, which purports to have been passed in pursuance of this charter, declared that until such contract should be avoided by a court of competent jurisdiction, the city should not erect, maintain or become interested in any water works except the ones established by the company, while the ordinance of June 20, 1893, provided for the immediate construction of a system of water works by the city for the purpose of supplying the city and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict—the latter clearly impaired the obligation of the former.

The argument of the city is that the council exceeded its powers in authorizing the contract with the Water Company for a continuous supply of water and the payment of rentals for twenty-five years, and that such contract was specially obnoxious in its stipulation that the city should not construct water works of its own during the life of the contract. The several objections to the contract are specifically stated by counsel for the city in their brief as follows:

a. The contract creates a monopoly which, in the absence of an express grant from the legislature of power so to do or such power necessarily implied, is void as in contravention of public policy;

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b. The contract is void as an attempt to contract away a part of the governmental power of the city council ;

c. The contract is void as creating an indebtedness in excess of the charter limits ;

d. The contract is in violation of the express provision of a general statute of the Territory of Washington.

By section 10 of the city charter, the city is authorized "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years, . . . provided always, that none of the rights or privileges hereinafter granted shall be exclusive or prevent the council from granting the said rights to others;" and by section 11 "the city of Walla Walla shall have power to erect and maintain water works within or without the city limits, or to authorize the erection of the same for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water."

As the contract in question was expressly limited to twenty-five years, and as no attempt was made to grant an exclusive privilege to the Water Company, the city seems to have acted within the strictest limitation of the charter. *Atlantic City Water Works v. Atlantic City*, 48 N. J. Law, 378.

Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect. It is true that in *City of Brenham v. Brenham Water Works*, 67 Texas, 542, a city ordinance granting to the water company the right and privilege for the term of twenty-five years of supplying the city with water, for which the city agreed to pay an annual rental for each hydrant, the Supreme Court of Texas held to be the grant of an exclusive privilege to the water company for the period named. The decision seems to have been rested largely upon the use of the words "privilege" and "supplying" — words which are not found in the contract in this case. Without expressing an opinion upon the point involved in that case, we are content to say

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that an ordinance granting a right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not, in our opinion, create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with a further stipulation that the city shall not erect water works of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise.

5. The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual. Thus in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, an act of the General Assembly of Illinois authorized the Fertilizing Company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might buy or own. Subsequently, the charter of the village of Hyde Park was revised, and

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power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals, or offensive matter, through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the State, citing *Coates v. Mayor &c. of New York*, 7 Cowen, 585.

Substantially, the same ruling was made in *Butchers' Union Co. v. Crescent City &c. Co.*, 111 U. S. 746, wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaughter houses, was held to be subject to subsequent ordinances of the city of New Orleans opening to general competition the right to build slaughter houses.

The same principle has been applied to charters for the maintenance of lotteries which, upon grounds of public policy, have been held to be mere licenses and subject to abrogation in the exercise of the police power of the government; *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101. U. S. 814; *Douglas v. Kentucky*, 168 U. S. 488; as well as to laws regulating the liquor traffic, *Beer Co. v. Massachusetts*, 97 U. S. 25; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; and even laws regulating the inspection of coal oil; *United States v. DeWitt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 501. In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a state inspector as unsafe for illuminating purposes.

Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York v. Squire*, 145

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U. S. 175; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.

6. Nor do we think the contract objectionable in its stipulation that the city would not erect water works of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the water works of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish water works of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.

An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not

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to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking.

Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party. The more prominent of these cases are *Minturn v. Larue*, 23 How. 435; *Wright v. Nagle*, 101 U. S. 791; *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262; *Logan v. Pyne*, 43 Iowa, 524; *Jackson Co. Horse Railroad v. Rapid Transit Railway Co.*, 24 Fed. Rep. 306; *Norwich Gas Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Grand Rapids Electric Light and Power Co. v. Grand Rapids Edison & Co. Gas Co.*, 33 Fed. Rep. 659; *Gale v. Kalamazoo*, 23 Michigan, 344. These cases furnish little or no support to the proposition for which they are cited.

If, as alleged in the answer, the Water Company failed to carry out its contract, and the supply furnished was inadequate for domestic, sanitary or fire purposes, and the pressure so far insufficient that in many parts of the city water could not be carried above the first story of the buildings, the seventh section of the contract furnished an adequate and

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complete remedy by an application to the courts to declare the contract void.

7. The objection that the indebtedness created by this contract exceeds the amount authorized by the charter raises a serious though by no means a novel question. The objection is founded upon section 105 of the charter, which enacts "that the limit of indebtedness of the city of Walla Walla is hereby fixed at fifty thousand dollars," and, upon the allegation in the bill that the city, at the date of the contract, was indebted in a sum exceeding \$16,000. The city, by section 5 of its ordinance and contract with the Water Company, agreed to pay a rental of \$1500 per annum for twenty-five years, or an aggregate amount of \$37,500, which, added to the existing indebtedness of \$16,000, would create a debt exceeding the limited amount of \$50,000.

There is a considerable conflict of authority respecting the proper construction of such limitations in municipal charters. There can be no doubt that if the city proposed to purchase outright, or establish a system of water works of its own, the section would apply, though bonds were issued therefor made payable in the future. *Buchanan v. Litchfield*, 102 U. S. 278; *Culbertson v. Fulton*, 127 Illinois, 30; *Coulson v. Portland*, Deady, 481; *State v. Atlantic City*, 49 N. J. Law, 558; *Spilman v. Parkersburg*, 35 W. Va. 605; *Beard v. Hopkinsville*, 95 Kentucky, 239. There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum, if the aggregate amount payable under such agreement exceeds the amount limited by the charter. *Niles Water Works v. Niles*, 59 Michigan, 311; *Humphreys v. Bayonne*, 55 N. J. Law, 241; *Salem Water Co. v. Salem*, 5 Oregon, 29.

But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter.

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There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by instalments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. *Wood v. Partridge*, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own, exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting water works upon the faith of the city paying its annual rentals. *Smith v. Dedham*, 144 Mass. 177; *Crowder v. Sullivan*, 128 Indiana, 486; *Saleno v. Neosho*, 127 Missouri, 627; *Valparaiso v. Gardner*, 97 Indiana, 1; *New Orleans Gas Light Co. v. New Orleans*, 42 La. Ann. 188; *Merrill Railway & Lighting Co. v. Merrill*, 80 Wisconsin, 358; *Weston v. Syracuse*, 17 N. Y. 110; *East St. Louis v. East St. Louis Lighting Co.*, 98 Illinois, 415; *Grant v. Davenport*, 36 Iowa, 396; *Lott v. Waycross*, 84 Georgia, 681; *Burlington Water Co. v. Woodward*, 49 Iowa, 58.

The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers or other salaried employes to whom

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the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen and the supply of water by the payment of annual rentals therefor.

It is true that in the case of *Lake County v. Rollins*, 130 U. S. 662, it was held by this court that a similar provision in the constitution of Colorado was an absolute limitation upon the power to contract any and all indebtedness, including warrants used for county expenses such as for witness and jurors' fees, election costs, charges for board of prisoners, county treasurers' commissions, etc.; but the case is readily distinguishable from the one under consideration. That was a suit against a county upon a large number of warrants for current expenses, the defence being a want of authority on the part of the county commissioners to issue warrants which had been put forth after the limit of indebtedness had been reached and even exceeded. They were held to be void. The case is authority for the proposition that if the annual rentals, payable in this case, with the other expenses, exceeded the limit of indebtedness, the transaction would be void; but, as it appears that the limit of indebtedness was \$50,000 and the amount of the city debt but \$16,000, it is clear that the payment of an annual rental of but \$1500 would be unobjectionable upon this ground. If such annual rentals exceeded the limit of indebtedness a different question would be presented.

8. Further objection is made to this contract upon the ground that it is violative of a general statute of the Territory of Washington, enacted December 1, 1881, authorizing cities, etc., to provide for a supply of water. By the first section of this act all cities are authorized to contract for a term not exceeding twenty-five years with corporations for a supply of water, but section 2 states that before any such contract

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shall be entered into, the terms of the proposed contract shall be submitted to a vote of the taxpayers at a special election to be called by the council after a notice of three weeks. As no such election was held to ratify the contract in this case, it is insisted that the city council was never authorized to enter into it.

We are of opinion, however, that the general act of 1881 was, so far as it applied to the city of Walla Walla, superseded by the charter of November 28, 1883, which provided that the city might enter into contracts for the purpose of supplying its inhabitants with water without any further requirement that an election should be held to ratify such contract. That no such ratification by the electors was intended is also evident from section 11 of the charter, which enacts that no water works shall be *erected* by the city without a vote of a majority of its freeholders. The fact that such ratification was required where water works were to be erected, and that no mention was made of a vote where the city contracted with a corporation for such purpose, clearly evinces an intent on the part of the legislature to permit the city to make a contract for a limited term without appealing to the people for their assent. While the special act is silent with reference to the ratification of contracts to supply water, we think the maxim *expressio unius est exclusio alterius* is applicable, and that it was clearly the intention of the legislature to supersede the general law in that particular, leaving the general law to stand where it is proposed that the city shall erect and maintain water works of its own.

9. Finally, it is argued, that upon the facts of this case it clearly appears that the plaintiff company has failed to comply with its contract to furnish an ample supply of good and wholesome water; that the pressure in the mains was not sufficient for fire protection, or for domestic purposes and irrigation of lawns; that the pressure was not a sufficient supply for satisfactory use in the second stories of buildings; that several of the city additions are higher than the reservoir, and cannot be supplied from them, etc.

We are of opinion, however, that these facts cannot be set up

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in defence to this bill. By the express provision of section 7 of the contract ordinance, it was made voidable by the city of Walla Walla so far as it required the payment of money, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of supply, or a failure on the part of the company to keep or perform any agreement on its part specified in the contract, and until "so avoided" the city would not erect water works of its own. Had the city failed to pay its quarterly rentals, we should have no doubt that in an action to recover the same it might set up the failure of the company to perform its contract. Perhaps it might itself institute an action for that purpose, but we do not think it within the power of the city to constitute itself the judge, and to proceed to erect water works of its own upon the theory that the company had failed to carry out its contract, without, in the language of section 7, obtaining the judgment of a court of competent jurisdiction to that effect. As the section provides the manner in which the failure of the company shall be legally established, we think the city was bound to pursue this course before taking steps to erect water works of its own. We have already held that so long as the contract remained in force the city had no right to establish water works, but under section 7 of the ordinance and contract the failure of the company to furnish a sufficient supply did not of itself avoid the contract. It rendered the contract voidable, not void. The city was bound to procure its nullity before the courts before it could treat it as void. Whether if a sudden emergency arose, requiring immediate action on the part of the city to procure a further supply, or to preserve the health of its inhabitants, a preliminary avoidance of the contract would be necessary, is a question not involved in this case, and upon which we express no opinion. There was no pretence that the water was impure, and the evidence was conflicting upon the sufficiency of the supply.

Upon the whole case, we are of opinion that the decree of the Circuit Court must be

Affirmed.